

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 185

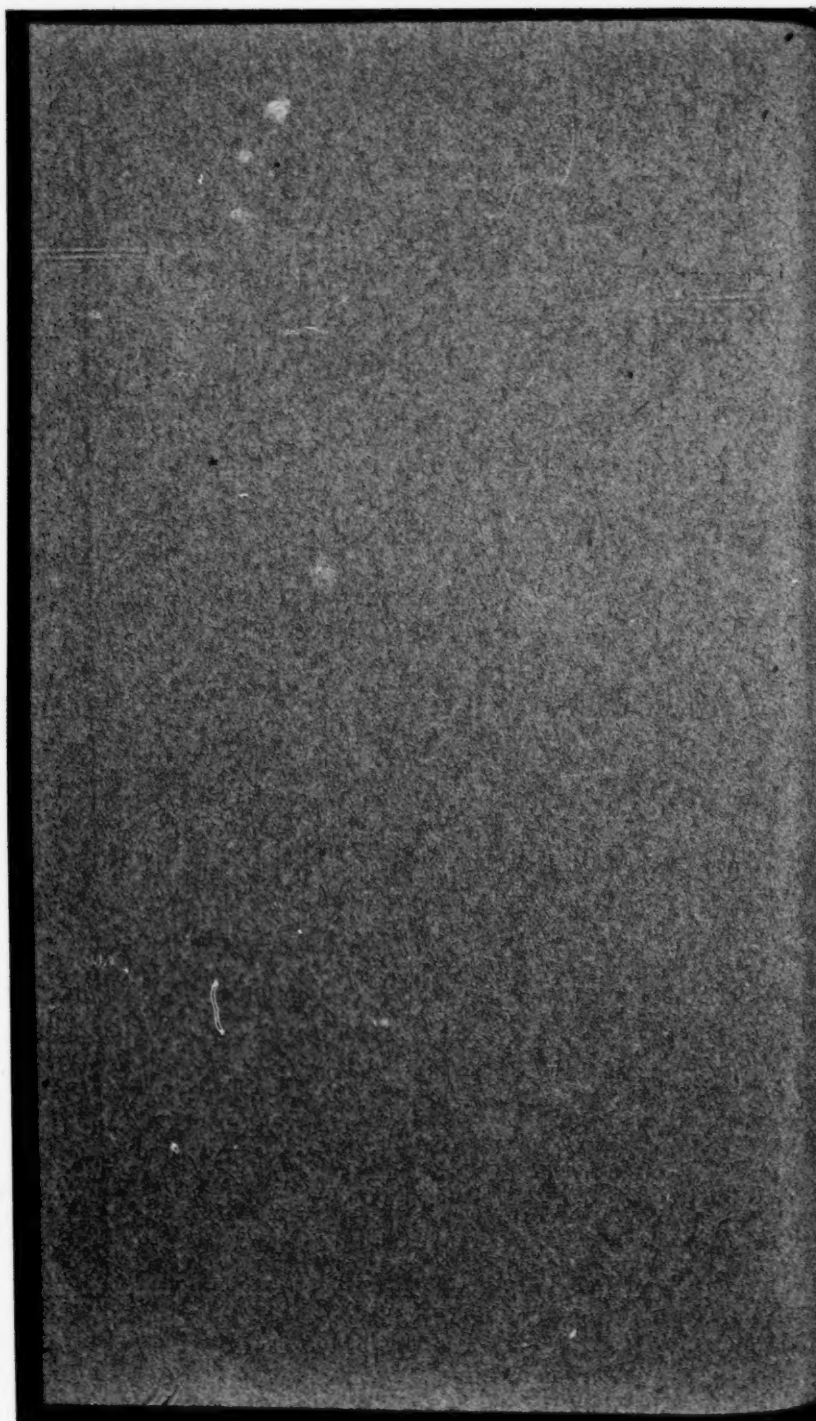
KNEAS J. MCCURDY, COUNTY TREASURER, OSAGE COUNTY,
OKLAHOMA, ANDREW H. LUDWICK, COUNTY CLERK,
OSAGE COUNTY, OKLAHOMA, THE BOARD OF COM-
MISSIONERS OF OSAGE COUNTY, OKLAHOMA, ET AL.
APPELLANTS.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 11, 1923.

(20,185)



(29,198)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 648.

ENEAS J. McCURDY, COUNTY TREASUER, OSAGE COUNTY,
OKLAHOMA; ANDREW B. LUDWICK, COUNTY CLERK,
OSAGE COUNTY, OKLAHOMA; THE BOARD OF COM-
MISSIONERS OF OSAGE COUNTY, OKLAHOMA, *ET AL.*,
APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, A. D. 1921, of said Court, before the Honorable John E. Carland, Circuit Judge, and the Honorable Jacob Trieber and the Honorable John C. Pollock, District Judges.

Attest:

[Seal of United States Circuit Court of Appeals Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the twenty-sixth day of September, A. D. 1921, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States was Appellant, and Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:



1 (Citation and Acknowledgment of service.)

In the United States District Court for the Western
District of Oklahoma.

The United States,)	
	Plaintiff,)
vs.)	
Eneas J. McCurdy, County Treasurer of)	
Osage County, Oklahoma, Andrew B.)	In Equity.
Ludwick, County Clerk of Osage)	No. 438.
County, Oklahoma, The Board of Com-)	
missioners of Osage County, Oklahoma,)	
The American National Bank of Paw-)	
huska, Oklahoma, and Robert S. Stuart,)	
Defendants.)	

The United States of America, ss.

To Eneas J. McCurdy, County Treasurer of Osage County,
Oklahoma, Andrew B. Ludwick, County Clerk of Osage
County, Oklahoma, The Board of Commissioners of Osage
County, Oklahoma, The American National Bank of Paw-
huska, Oklahoma, and Robert S. Stuart,
Greeting:

You are hereby cited and admonished to be and appear at
the United States Circuit Court of Appeals for the Eighth
Circuit to be held at the City of St. Louis, in the State of
Missouri, within sixty days from and after the date hereof,
pursuant to an order allowing an appeal of record in the
Clerk's office of the United States District Court for the
Western District of Oklahoma, wherein the United States
is appellant and you are appellees, to show cause, if any there
be, why the decree entered in said cause on or about May
13th, 1921, as in said order allowing said appeal mentioned
should not be corrected, and why speedy justice should not
be done to the parties in that behalf.

Witness the Honorable John H. Cotteral, United States
District Judge for the Western District of Oklahoma, this
27 day of July in the year of our Lord One Thousand Nihe

Hundred and Twenty-one and of the Independence of the United States of America the One Hundred and Forty-sixth.

JOHN H. COTTERAL,
United States District Judge.

Service of the above citation is hereby acknowledged this 29 day of July 1921, for and on behalf of the defendants and appellees.

ELMER E. GRINSTEAD
EUGENE F. SCOTT
Solicitors for defendants and appellees.

Endorsed: Filed in the District Court on August 1, 1921.

Bill of Complaint.

In the District Court of the United States for the
Western District of Oklahoma.

United States of America,

Plaintiff,

vs.

Eneas J. McCurdy, County Treasurer of
Osage County, Oklahoma, Thomas M.
Broadus, County Clerk of Osage County,
Oklahoma, The American National Bank
of Pawhuska, Oklahoma, and Robert S.
Stuart,

Defendants.

In Equity.
No. 438.

To the Honorable Judge of the Western District of Oklahoma:

The United States of America, by its undersigned solicitors, acting by the authority and under the direction of the Attorney General, in its own behalf and on behalf of the Osage Indian allottees, and the heirs of such Indians, mentioned in the accompanying schedule, which is attached hereto and marked "Schedule A", and on behalf of all other Osage Indians similarly situated, brings this bill of complaint against the defendants named in the caption above, and thereupon complains and shows to the Court:

That defendants Eneas J. McCurdy and Thomas M. Broadus are citizens of the State of Oklahoma and residents of and can be found at the City of Pawhuska, Oklahoma, within said District, and that said defendants in the order named, were duly elected to the respective offices of County Treasurer and County Clerk of Osage County, Oklahoma, and now are the duly qualified and acting incumbents of said Offices, respectively.

That defendant, The American National Bank of Pawhuska, Oklahoma, now is, and at all times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the United States, with its principal place of business at Pawhuska, Oklahoma, within the said District.

That defendant, Robert S. Stuart, is a citizen of the State of Oklahoma, and a resident of and can be found at Pawhuska, Oklahoma, within said District, and that said defendant is the attorney and representative of The American National Bank of Pawhuska, Oklahoma, a defendant herein.

II.

That the lands herein involved were originally a part of the tribal domain of the Osage Nation or Tribe of Indians in Oklahoma and were allotted to [ir] inherited by Osage Indians pursuant to law, and are subject to the provisions of the Acts of Congress approved June 28th, 1906 (34 Statutes at Large, page 539) and April 18, 1912 (30 Statutes at Large, page 86), relating to the alienation, taxation and other disposition of such lands.

III.

That the United States of America, in its sovereign capacity, as guardian and trustee for said Indians, to enforce and carry out its policy as defined by the Acts of Congress applicable thereto, is charged with the duty and authority to protect them from unjust and unlawful taxation and to contest the collection of taxes so imposed and the sale of their lands therefor.

IV.

Plaintiff is informed and believes that at some date prior to November 5, 1917, defendant Eneas J. McCurdy acting in

his official capacity as County Treasurer of Osage County, Oklahoma, advertised for sale the lands herein, involved to enforce the collection of delinquent taxes for the year 1909, supposed to be due thereon, and that pursuant to such advertisement a public sale of said lands was held on the 5th day of November, 1917, at the City of Pawhuska, Oklahoma, and that at said time and place the said lands were sold to The American National Bank of Pawhuska, Oklahoma, a defendant herein.

4

V.

Plaintiff is further advised and believes that pursuant to the sale aforesaid, there were issued by the said Eneas J. McCurdy to the said The American National Bank, defendants herein, certain tax sale certificates in evidence of such sale and in confirmation of the supposed rights of the purchaser thereunder.

VI.

That defendant, The American National Bank of Pawhuska, Oklahoma, purchased said lands for the purpose of speculation therein, and that its action in so doing was beyond the scope of its authority as a national bank, and that in initiating the purchase of said lands and in endeavoring to consummate such purchase it acted in contravention of the provisions of the Act of Congress approved June 3, 1864; c. 106, sec. 28, 13 Stat. L; 107; R. S. sec. 5137.

VII.

That it was required by the laws of Oklahoma in force during the year 1909 and the preceding year that real property in said State should be assessed in the name of the owner as of March 1st each year; that the allotment of the lands herein involved and the transfer of title thereto were not fully accomplished and plaintiff's duties and functions with respect to the administration of the Osage allotment act of 1906 were not fully discharged, until a date or dates subsequent to March 1, 1909, for the reason that deeds to the allottees were not approved and delivered until after March 1, 1909; that the three year period, during which the surplus allotments of Osage Indians were generally exempt from taxation, did not end until June 28, 1909.

5

VIII.

Plaintiff is informed and believes that no assessment was made in the year 1909 by the officers of Osage County, Oklahoma, of the lands herein involved, for purposes of taxation and that no claim was made or asserted for such taxes until some time during the year 1915 and then only upon the demand of the State Tax Ferret; that the plaintiff and the Indians in whose behalf this suit is being prosecuted were not afforded any opportunity to contest the said taxes, pursuant to the usual and timely remedies afforded by law, or given any notice, as required by the law of the State of Oklahoma, that taxes were due and delinquent upon their allotted lands.

IX.

That defendant, Robert S. Stuart, on behalf of the said The American National Bank, by letters written to the Superintendent of the Osage Indian Agency, or to other persons employed therein, informed plaintiff that said Bank was the holder of the Tax Sale Certificates mentioned in the attached schedule "A", but did not inform plaintiff that the 60 days' notice required by the laws of Oklahoma had been given to the owner of the land upon which the taxes claimed had been assessed, said notice being a condition precedent to the delivery of deed to the purchaser in case of a tax sale; that in one case a supposed copy of the notice purporting to have been served by the Sheriff upon the owner of a tract of land included in the attached schedule "A", viz., one A-non-to-op-pe was furnished to the Office of the Superintendent of the Osage Indian Agency, but that said notice omitted the day of the month in which the same appeared to have been served, and in this connection plaintiff says that it has very recently learned, upon inspection by its officers of the original notice addressed to the said A-non-to-op-pe, that the Sheriff's return was in fact made
6 in a different month than that shown in the supposed copy of said notice which was furnished the office of the Osage Indian Agency as aforesaid;

X.

That the record of Delinquent Tax Sales in the Office of the County Treasurer for Osage County is incomplete, in that it fails to show all the facts required to be recorded

therein by the laws of the State of Oklahoma, the omissions being such that it is impossible to ascertain from an inspection thereof whether the 60 days' notice aforesaid has been given in any case; that plaintiff, by its attorney, made an examination several weeks ago of said record to ascertain whether any such notices had been issued as a preliminary step to the delivery of deeds to purchasers of lands herein involved, and that by reason of the state of the record of Delinquent Tax Sale was mis-led into believing that there was then no immediate probability of the issuance to the purchasers of said lands of tax title deeds thereto; that very recently plaintiff has been informed by defendant, Robert S. Stuart, on behalf of the said The American National Bank that deeds will be demanded in 10 days in certain cases involved herein unless the amounts claimed to be due for taxes shall be paid within that time.

XI.

That plaintiff was entitled in each case where the said 60 days' Notice was given to the owner of restricted Indian land to be served with a copy of such notice, but that no such notice was served upon plaintiff respecting any of the lands herein involved.

XII.

That in certain of the cases included in the attached schedule "A", the Indian to whom the allotment was made died subsequent to the approval and delivery of the allotment deed; that in other cases mentioned in said allotment the so-called allottee died before the approval and delivery of the land to which he would have been entitled to receive as an allotment, if living; that in other cases allottees are living; that in all cases the allotment deeds conveying to individual allottees or their heirs the lands herein involved were not approved or delivered until after June 28, 1909.

XIII.

Plaintiff is informed and believes that in certain of the cases included in said schedule "A" the lands sold for taxes as aforesaid have been redeemed by the owners of said lands by the payment of the taxes assessed thereon for the year 1909 and for subsequent years, together with certain penal-

ties and interest payments; that such payments were made under duress, in that said owners were threatened with the loss of said lands, through issuance of deeds to the purchasers, as well as to the payment of large amounts by way of penalties and interest; that in certain other cases the taxes alleged to be due and delinquent have not been paid and that by reason of such non-payment the owners of such lands are threatened with the loss of their lands and to further payments on account of penalties and interest.

XIV.

That the Tax Sale Certificates and all other writings purporting to evidence title in the lands hereof issued to the purchasers thereof at said tax sale and all records in the offices of the County Treasurer and County Clerk, respectively, of Osage County, Oklahoma, evidencing in any way any right, title or interest in such purchasers by reason of said sales for delinquent taxes, penalties and interest constitute a cloud upon the title of the said Osage Indians to the lands herein involved to the detriment and financial injury of said Osage Indians, and to the injury of plaintiff as well, in that the acts herein complained of in derogation of the duties and functions of the Government in the premises.

8

XV.

That all sums collected from the owners of the lands herein involved, including assessments made in the year 1909, and in any subsequent year, together with the penalties and interest collected on all alleged Delinquent Taxes, were erroneously and unlawfully collected and should be refunded; that all claims for taxes, penalties and interest alleged to be due and unpaid, growing out of or based upon the said sale of the lands herein involved for the year 1909 are unlawful and improper and should be withdrawn.

XVI.

Plaintiff says that in certain cases included in the attached schedule "A" that the sums unlawfully collected or claimed include various amounts assessed as taxes upon said lands for the years 1910 to 1917, inclusive, together with penalties and interest thereon, and that the amount and legality of all such assessments, with the claimed penalties and inter-

est thereon are matters which are involved in the case of *The United States of America v. The Board of County Commissioners of Osage County, Oklahoma, et al*, Equity No. 243, pending in this court; that defendants herein, Eneas J. McCurdy and Thomas M. Broaddus, are also defendants in said case, and that on the 2nd day of August, 1920, there was filed in said case, by plaintiff, in the office of the Clerk of the United States Court for the Western District of Oklahoma, an order to take bill of complaint as confessed, and that copies of said order were immediately transmitted by plaintiff's attorney by letters mailed at Pawhuska, Oklahoma, to the County Attorney for Osage County, Oklahoma, the attorney of record in said case, and to the Chairman of said Board of Commissioners, respectively, for their information.

9

XVII.

That the attached schedule marked "A", shows the names of the allottees and owners of the lands herein involved, the allotment numbers of said allottees, the description of said lands and the numbers of the tax sale certificates issued by reason of said sale of November 5, 1917, as furnished by defendant Robert S. Stuart, and is herewith submitted subject to such corrections, if any, as may be found necessary by comparison with official records; that this suit is instituted specially for the benefit of the owners aforesaid and generally for the benefit of all other Osage Indians similarly situated.

XVIII.

To the end, therefore, that plaintiff may have that relief which it can only obtain in a court of equity, being without full and adequate remedy at law, and that the said defendants may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by plaintiff, may it please Your Honor to grant unto plaintiff a writ of injunction pendente lite issued out of and in accordance with the rules and practice of this Honorable Court, to be directed to the said defendants, Eneas J. McCurdy and Thomas M. Broaddus, County Treasurer and County Clerk, respectively, of Osage County, Oklahoma, enjoining them and their assistants, agents, servants, employees and confederates from executing or delivering any tax certificates of sale, deeds or other instruments of title

affecting the lands herein involved, whether identified in general or specific terms, and from interfering in any manner with said lands, or any part thereof, and from making any record showing the sales or the offer for sale
10 of any of such lands, and from in any manner hindering or obstructing plaintiff or its representatives in the performance of its duties as guardian and trustee over said Indians and lands, and from in any manner encumbering the right, title, or claim of said Indians to the lands herein involved, and from collecting or attempting to collect, by reason of said sale of November 5, 1917, any sum or sums of money as delinquent taxes for the year 1909 or any subsequent year, as well as any sum or sums claimed to be due as penalties or interest on any of said tax sums; and may it also please Your Honor to grant a similar writ of injunction to be directed to the said defendants, The American National Bank of Pawhuska, Oklahoma, and Robert S. Stuart, enjoining them, their agents, employees, and confederates from collecting or demanding any sum of money from the owners of said lands, by reason of said sale of November 5, 1917, and from attempting in any way to obtain any tax sale certificate, deed or other instrument of title or encumbrance affecting said lands by reason of said sale; and that at the final hearing said injunction or injunctions be made perpetual.

Plaintiff also prays that a decree be entered by this Honorable Court vacating, setting aside, and holding for naught all assessments made in the year 1909, for taxes upon the said lands, and all tax sale certificates, tax deeds or other instruments or writings executed or delivered by any of defendants herein, by reason of said sale of November 5, 1917, affecting the said lands.

Plaintiff further prays that defendants Eneas J. McCurdy, the said The American National Bank and Robert S. Stuart be held jointly and severally indebted to the owners of the lands herein involved to the amount of all sums paid by them, or on their behalf, because of any sum claimed
11 to be due for Delinquent Taxes by reason of any assessment made in the year 1909, together with all sums collected as penalties or interest on such taxes, and also that a similar decree be rendered as to all sums paid by or on behalf of the owners of said lands by reason of tax assessments thereon made for any year subsequent to the

year 1909, together with the amount of all resulting penalties and interest so paid, where payment of such subsequent tax assessments, penalties and interest was incidental to the redemption of the land or the cancellation of any tax sale certificate; that said defendants be directed to refund to the plaintiff, all sums paid to them or any of them, where the liability herein claimed is found to exist, together with interest at the rate of six percent per annum from the date of the unlawful collection of such moneys until the date the same shall be refunded; that said defendant, Eneas J. McCurdy be held personally, as well as officially for the return of all sums so illegally collected from the owners of said lands or from any one acting in their behalf.

Plaintiff further prays that its right to recover, for the reasons herein claimed, any sum or sums collected as taxes, penalties or interest because of the assessment of said land for taxes in any year or years subsequent to the year 1909, where the legality of such assessments, taxes, penalties and interest is involved in said suit of the United States of America v. The Board of County Commissioners of Osage County, Oklahoma, et al., be determined without prejudice to the right of plaintiff to have the issues presented in said suit adjudicated therein.

Plaintiff finally prays for relief, general and special, touching the matters and things herein alleged, not inconsistent with the allegations of this bill, and plaintiff offers to do equity in respect to all matters, things and persons mentioned herein, as shall be deemed just and equitable by this Honorable Court.

12 And may it please Your Honor to grant to plaintiff a writ or writs of subpoena to be directed to the said Eneas J. McCurdy and Thomas M. Broaddus, County Treasurer and County Clerk, respectively, of Osage County, Oklahoma, and to the said The American National Bank of Pawhuska, Oklahoma, and to the said Robert S. Stuart, thereby commanding them at a time certain and under a certain penalty therein to be limited, to personally appear before this Honorable Court, and then and there full, true, direct and perfect answer to make to all and singular the premises, and to stand, perform and abide by such orders, direction and decree as may be made against them, or either

of them in the premises as shall be just and equitable, and that plaintiff may recover its costs herein expended.

HERBERT M. PECK,
United States Attorney.

JOSEPH W. HOWELL,
Special Assistant to the Attorney General.

13 State of Oklahoma, ss.
Osage County.

Clarence Lohman, being first duly sworn on oath states that he has read the foregoing bill and knows the contents thereof and that the allegations therein contained are true, except such allegations as are upon information and belief, and as to those he verily believes them to be true.

CLARENCE LOHMAN.

Subscribed and sworn to before me this 1st, day of September, 1920.

GEO. N. WISE,
Notary Public.

My commission expires May 10, 1923.
(Seal)

14 Schedule "A"

Schedule referred to in paragraph 1, of Plaintiff's Bill, in the case of the United States of America, Plaintiff, vs. Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma; Thomas M. Broadbuss, County Clerk of Osage County, Oklahoma; The American National Bank of Pawhuska, Oklahoma; and Robert S. Stuart.

(All descriptions subject to correction.)

1.

Allottee #200

Owner, alleged to be Mr. Christine Boutin of
Denver, Colo.

Description of Land:

W $\frac{1}{2}$ NE $\frac{1}{4}$; SE $\frac{1}{4}$ NW $\frac{1}{4}$; NW $\frac{1}{4}$
SE $\frac{1}{4}$ of 28-24-4

No. of Tax Sale Certificate
9133.

2.

Allottee #168

Owners, alleged to be Edward Cox, Osage Allottee #165 and A-non-to-op-pe #166.

Description of Land:	No. of Tax Sale Certificate.
Lot 3 and SE $\frac{1}{4}$ of NW $\frac{1}{4}$ 6-24-5	9126.

3.

Allottee #168

Owners, alleged to be Edward Cox, Osage Allottee #165 and A-non-to-op-pe #166.

Description of Land:	No. of Tax Sale Certificate
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of 17-25-5	9130

Allottee #96

Owner, alleged to be Fanny Wheeler (Now deceased—heirs determined by County Court Dec. 3, 1918, to be as follows:

Ben Wheeler, Husband	1/3
Fred Wheeler, Son	1/6
Mary Wheeler, Daughter	1/6
Louis Wheeler, Son	1/6
Francis Wheeler, Son	1/6

15	Description of Land:	No. of Tax Sale Certificate
	N $\frac{1}{2}$ NE $\frac{1}{4}$; SW $\frac{1}{4}$ NE $\frac{1}{4}$; NE $\frac{1}{4}$ NW $\frac{1}{4}$ of 29-23-6.	9170

5.

Allottee #96.

Owner, alleged to be Fanny Wheeler (Now deceased heirs determined by County Court Dec. 3, 1918, to be as follows:

Ben Wheeler, Husband	1/3
Fred Wheeler, Son	1/6
Mary Wheeler, Daughter	1/6
Louis Wheeler, Son	1/6
Francis Wheeler, Son	1/6

Description of Land:	No. of Tax Sale Certificate:
E $\frac{1}{2}$ SW $\frac{1}{4}$; N $\frac{1}{2}$ SE $\frac{1}{4}$ of 30-24-7	9171.

6.

Allottee #57

Owner, alleged to be Wah-shin-kah-sop-py

Osage allottee #63.

Description of Land:

No. of Tax Sale Certificate:

Lots 1 & 2; S $\frac{1}{2}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$
of 4-21-7

9005.

7.

Allottee #770

Owners, alleged to be Ho-ki-ah-se, Osage Allottee #766, and Me-tse-he, Osage Allottee #767.

Description of Land:

No. of Tax Sale Certificate:

Lot 2; SW $\frac{1}{4}$ of NE $\frac{1}{4}$; and W $\frac{1}{2}$
of SE $\frac{1}{4}$ 2-23-8

9025

8.

Allottee #57.

Owner, alleged to be Wah-shin-kah-sop-py

Osage Allottee #63.

Description of Land:

No. of Tax Sale Certificate:

NW $\frac{1}{4}$ of 36-22-7

9207.

16

9.

Allottee #564

Owner, alleged to be Pah-pu-son-tsa

Description of Land:

No. of Tax Sale Certificate:

N $\frac{1}{2}$ of S $\frac{1}{2}$ 3-28-7

8009.

10.

Allottee #2178

Owner, alleged to be A-non-to-op-pe #166.

Description of Land:

No. of Tax Sale Certificate:

SE $\frac{1}{4}$ of 3-21-9

8996.

11.

Allottee #172

Owners, alleged to be Dora Neal, and _____
Neal.

Description of Land:

No. of Tax Sale Certificate:

NW $\frac{1}{4}$ of NW $\frac{1}{4}$ 9-27-8

9045

12.

Allottee #172

Owners, alleged to be Dora Neal and _____
Neal.Description of Land:
E $\frac{1}{2}$ of SE $\frac{1}{4}$ 6-27-8No. of Tax Sale Certificate:
9046.

13.

Allottee #172

Owners, alleged to be Dora Neal, and _____
Neal.Description of Land:
E $\frac{1}{2}$ of NE $\frac{1}{4}$ 7-27-8No. of Tax Sale Certificate:
9047.

14.

Allottee #403

Owners, alleged to be Myron Bangs, Jr., and
Lucy Bangs, #404.Description of Land:
S $\frac{1}{2}$ of SE $\frac{1}{4}$ 16-29-8No. of Tax Sale Certificate:
9060.

17

15.

Allottee #403

Owners, alleged to be Myron Bangs, Jr. and
Lucy Bangs, #404.Description of Land:
E $\frac{1}{2}$ of NE $\frac{1}{4}$ 21-29-8No. of Tax Sale Certificate:
9061

16.

Allottee #180

Owners, alleged to be To-wah-gah-she #162
Gilbert Cox #139, Edward Cox #165,
E-ne-k-op-pe #98.Description of Land:
SW $\frac{1}{4}$ of NE $\frac{1}{4}$; N $\frac{1}{2}$ of SE $\frac{1}{4}$;
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 13-24-4No. of Tax Sale Certificate:
9131

17

Allottee #2126

Owners, alleged to be Amos Osage #118 and
Ne-kah-ah-se #119.

Description of Land:

NE $\frac{1}{4}$ of NE $\frac{1}{4}$ 8-33-6

No. of Tax Sale Certificate:

9173

18

Allottee #2126

Owners, alleged to be Amos Osage #118 and
Ne-kah-ah-se #119.

Description of Land:

NW $\frac{1}{4}$ of NW $\frac{1}{4}$ 9-23-6

No. of Tax Sale Certificate:

9174

19.

Allottee #334.

Owners, alleged to be Francis Drexel #329, and
Wah-ko-sah-moie #330.

Description of Land:

SE $\frac{1}{4}$ of 9-25-4

No. of Tax Sale Certificate:

9145.

20.

Allottee #368

Owner, alleged to be Wah-hrah-lum-pah #198.
(20 cont'd.)

18

Description of Land:

SE $\frac{1}{4}$ of 1-23-3

No. of Tax Sale Certificate:

9147.

21.

Allottee #333

Owners, alleged to be Wah-ko-sah-moie #330.
Ne-ah-kah-se- #331, Me-tsa-kah #332,
To-pah-mois, Tsa-me-tsa-he, E-to-wah-ah.

Description of Land:

SE $\frac{1}{4}$ of NW $\frac{1}{4}$; E $\frac{1}{2}$ of SW $\frac{1}{4}$

No. of Tax Sale Certificate:

9142.

SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-24-5

22.

Allottee #2176

Owners, alleged to be David Peace, Joseph
Peace, and Clara Marshall #271.

Description of Land:

NW $\frac{1}{4}$ of NW $\frac{1}{4}$ 29-24-6

No. of Tax Sale Certificate.

9193.

23

Allottee #2176

Owners, alleged to be David Peace, Joseph Peace, and Clara Marshall #271.

Description of Land:

W $\frac{1}{2}$ of NE $\frac{1}{4}$; NE $\frac{1}{4}$ of NW $\frac{1}{4}$
3-24-6No. of Tax Sale Certificate:
9194.

24.

Allottee #403

Owners, alleged to be Lucy Bangs #404, and Myron Bangs, Jr.

Description of Land:

SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-26-7No. of Tax Sale Certificate:
9200.

25.

Allottee #403

Owners, alleged to be Lucy Bangs #404 and Myron Bangs, Jr.

Description of Land:

E $\frac{1}{2}$ of NE $\frac{1}{4}$ 29-26-7No. of Tax Sale Certificate:
9201

19

26.

Allottee #403

Owners, alleged to be Lucy Bangs #404 and Myron Bangs, Jr.

Description of Land:

SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 32-26-7No. of Tax Sale Certificate:
9202.

27.

Allottee #414

Owners, alleged to be Peter Clark, Mildred Abbott, Isabelle Pitts, Lucy Bangs #404 Roman Logan.

Description of Land:

SW $\frac{1}{4}$ 33-26-7No. of Tax Sale Certificate:
9203

28.

Allottee #527

Owners, alleged to be Alice McGraw, Rosa L. Deal, Sarah Bigheart, Belle Bigheart and George W. Swift.

Description of Land:

N $\frac{1}{2}$ NW $\frac{1}{4}$; SE $\frac{1}{4}$ NW $\frac{1}{4}$ 9-24-11No. of Tax Sale Certificate:
9103

29

Allottee #527

Owners, alleged to be Alice McGraw Rose L.
Deal, Sarah Bigheart, Belle Bigheart,
George W. Swift,

Description of Land: No. of Tax Sale Certificate:
W $\frac{1}{2}$ of NE $\frac{1}{4}$ 20-24-11 9104

Endorsed: Filed in the District Court on September 2, 1920.

20 (Motion of defendants, McCurdy, et al., to
dismiss.)

Comes now the defendants Eneas J. McCurdy, as County Treasurer, Osage County, Oklahoma, and Thomas M. Broadus, as County Clerk Osage County, Oklahoma, by their counsel of Record, Corbett Cornett, County Attorney, Osage County, Oklahoma, and Elmer E. Grinstead and Eugene F. Scott, of Pawhuska, Oklahoma, and move the court to dismiss plaintiff's bill as to them for the reason:

Because of insufficient statement of facts in said bill to constitute a valid cause of action in Equity as against these moving defendants.

CORBETT CORNETT,
County Attorney,
Osage County,

And ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Counsel for Moving Defendants.

Endorsed: Filed in the District Court on September 27, 1920.

21 (Motion of defendant, American National Bank,
to dismiss.)

Comes now the defendant, The American National Bank of Pawhuska, Oklahoma, by its counsel of record, Corbett Cornett, County Attorney, Osage County, Oklahoma, and Elmer

E. Grinstead, and Eugene F. Scott, of Pawhuska, Oklahoma, and move the court to dismiss plaintiff's bill as to it for the reason:

Because of insufficient statement of facts in said bill to constitute a valid cause of action in Equity as against this moving defendant.

CORBETT CORNETT,
County Attorney,
Osage County.

and ELMER E. GRINSTEAD,
EUGENE F. SCOTT
Counsel for Moving Defendant,

Endorsed: Filed in the District Court on September 27,
1920

22 (Motion of defendant, Stuart, to dismiss.)

Comes now the defendant, Robert Stuart, by his counsel of record, Corbett Cornett, as County Attorney, Osage County, Oklahoma, and Elmer E. Grinstead and Eugene F. Scott, of Pawhuska, Oklahoma, and move the court to dismiss plaintiff's bill as to him for the reason:

Because of insufficient statement of facts in said bill to constitute a valid cause of action in equity as against this moving defendant.

CORBETT CORNETT,
County Attorney,
Osage County.

and ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Counsel for Moving Defendant.

Endorsed: Filed in the District Court on September 27,
1920.

23 (Order, November 15, 1920, overruling motions to dismiss.)

Before Judge Cotteral.

On this 15th day of November, 1920, the separate motions of defendants to dismiss the bill come on for hearing, arguments of counsel are heard thereon and the court being duly advised in the premises, it is ordered that said motions and each of them be and they are overruled, to which order and ruling of the court the defendants and each of them except.

24 (Amended Bill of Complaint.)

In the District Court of the United States
for the Western District of Oklahoma

United States of America,)	
	Plaintiff,)
v.)	
Eneas J. McCurdy, County Treasurer,)	
of Osage County, Oklahoma, Andrew)	
B. Ludwick, County Clerk of Osage)	In Equity,
County, Oklahoma, The Board of Com-)	No. 438.
missioners of Osage County, Okla-)	
homa, The American National Bank of)	
Pawhuska, Oklahoma, and Rober. S.)	
Stuart,)	
	Defendants.)

To the Honorable the Judge of the United States District
Court for the Western District of Oklahoma:

The United States of America, by its undersigned solicitors, acting by the authority and under the direction of the Attorney General, in its own behalf as Sovereign, and as guardian and trustee of the Osage Indian Allottees, and heirs of such Indians mentioned in the accompanying schedule which is attached hereto and marked "Schedule A", and as guardian and trustee of all other Osage Indians similarly situated, with the leave of the Court first had and obtained, brings this Amended Bill of Complaint against the defendants named in the caption above, and thereupon complains and shows to the Court:

25 That defendants, Eneas J. McCurdy and Andrew B. Ludwick, are citizens of the State of Oklahoma and residents of and can be found at the City of Pawhuska, Oklahoma, within said District, and that said defendants in order named, were duly elected to the respective offices of County Treasurer and County Clerk of Osage County, Oklahoma, and now are the duly qualified and acting incumbents of said offices, respectively, the said Andrew B. Ludwick having assumed the office of County Clerk of Osage County on the 1st day of January, 1921, as the successor of Thomas M. Broadbuss who was named as one of the defendants in the original bill of complaint filed in this cause.

That defendant, The Board of County Commissioners of Osage County, Oklahoma, is the executive and governing board of said County, and is composed of William T. Leahy, Chairman, and James Perrier and Charles Cook, Commissioners, and that each of the members of said Board is a citizen of the State of Oklahoma, and a resident of the City of Pawhuska, in said State.

That defendant, The American National Bank of Pawhuska, Oklahoma, now is, and at all times here-in-after mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the United States, with its principal place of business at Pawhuska, Oklahoma, within said District.

26 That defendant, Robert S. Stuart, is a citizen of the State of Oklahoma and a resident of and can be found at Pawhuska, Oklahoma, within said District, and that said defendant is the attorney and representative of The American National Bank of Pawhuska, Oklahoma, a defendant herein.

II.

That the lands herein involved are a part of the territory or domain formerly owned by the Osage Nation or tribe of Indians in Oklahoma; that said territory formerly belonged to the Cherokee Nation in the Indian Territory, subject to the reversionary interest of the United States, and was by deed executed by the proper officers of the Cherokee [National], conveyed, on the 14th day of June, 1883, to the United States of America "In trust for the use and benefit of the Osage and Kansas Indians"; that the lands herein involved were allotted to or inherited by members of the Osage Tribe or

their heirs subject to the provisions of the Act of Congress, approved June 28, 1906, (34 Stat., 539) and the Act of Congress, approved April 18, 1912 (37 Stat., 86) relating to the alienation, taxation and the other disposition of such lands, including Section 5 of said Act of June 28, 1906, which provides:

"That at the expiration of the period of twenty-five years from and after the first day of January, Nineteen Hundred and Seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the Individual members of the Osage Tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as herein provided."

27

III

That the United States of America, in its sovereign capacity and as guardian and trustee for said Indians, to enforce and carry out its policy as defined by the Acts of Congress applicable thereto, is charged with the duty and authority to protect them from unjust and unlawful taxation and to contest the collection of taxes so imposed and the sale of their lands therefor; that plaintiff is also charged with the duty and authority, in its sovereign capacity, to enforce and carry out the laws of the United States regulating the business of National Banks and prescribing the powers and limitations of such banks.

IV

Plaintiff is informed and believes that at some date prior to November 5, 1917, defendant Eneas J. McCurdy, acting in his official capacity as County Treasurer of Osage County, Oklahoma, advertised for sale the lands herein involved to enforce the collection of delinquent taxes for the year 1909, supposed to be due thereon, and that pursuant to such advertisement a public sale of said lands was held on the 5th day of November, 1917, at the City of Pawhuska, Oklahoma,

and that at said time and place the said lands were sold to the American National Bank of Pawhuska, Oklahoma, a defendant herein.

V

Plaintiff is further advised and believes that pursuant to the sale aforesaid, there were issued by the said Eneas J. McCurdy to the said The American National Bank, [defendants] herein, certain tax sale certificates in evidence of such sale and in confirmation of the supposed rights of the purchaser thereunder.

VI

That defendant, The American National Bank of Pawhuska, Oklahoma, purchased said lands for the purpose of speculation therein, and that its action in so doing was beyond the scope of its authority as a National Bank and that in initiating the purchase of said lands and in endeavoring to consummate such purchase it acted in contravention of the provisions of the Act of Congress approved June 3, 1864; (C. 106, Sec. 28, 18 Stat., L., 107; R. S. Sec. 5137.)

VII

By the laws of Oklahoma real estate in said State was subject to assessment for taxes for the year 1909 in the name of or to the owner as of March 1, 1909, that the United States and the Osage Tribe were the owners, respectively, of the legal and equitable titles to the lands herein involved, on said date; that the lands embraced in this suit, in each case, were included in a certain schedule of tentative Osage allotments approved by Jesse E. Wilson, as Assistant Secretary of the Interior, on the 19th day of November, 1908; that in all such cases the members of the Osage Tribe in whose names the respective allotment selections were made, died before November 19, 1908, except Wah te sah and Wah Hrah lumpah, who died December, 10, 1908, and March 28, 1909, respectively, and the word "dead" was noted on said allotment schedule in connection with each of the names of

said members, who died prior to the completion thereof; that the approval of said schedule by the Assistant Secretary was one of a series of steps looking to the final transfer of the title to said lands to the respective Indians entitled thereto; that [sallotment] deeds to said lands were made and executed in each and every case by

the principal Chief of the Osage Tribe to the respective Indian grantees either in the month of May or June [if] the year 1909, and not sooner; that each and all of such deeds were approved by the Secretary of the Interior or his proper representative on the 30th day of July, 1909; that Section 8 of said act of June 28, 1906, provides,

That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior.

VIII

That Schedule A, referred to in paragraph 1 hereof, is a true and correct compilation of data which is a matter of record in the office of the Superintendent for the Osage Agency and that said schedule shows (1) the names of the deceased members of the Osage Tribe in whose right the lands in question were selected, (2) the dates of the respective deaths of said members, (3), the names of the heirs to whom tribal deeds of conveyance were made, (4) the descriptions of the several tracts so conveyed, (5) the names of the present owners of said tracts, (6) the status of such owners with respect to race, enrollment and competency, and
30 (7) the changes that have been made touching or affecting said lands by reason of deaths, removal of restrictions or by sales, together with the numbers of the tax sale certificates where such lands were sold for taxes for the year 1909.

That the persons to whom the lands described in said schedule "A" were conveyed, as tenants in common, as heirs of deceased members of the Osage Tribe, are of four classes, to-wit; (1) Enrolled members of the Osage Tribe, to whom no certificates of competency have been issued, (2) restricted minors of Osage Indian blood and descent who have no enrollment status, (3) Enrolled members of the Osage Tribe who have received Certificates of Competency, and (4) White persons; that in all cases the said heirs included, as to each tract described in said schedule, one or more Enrolled Osage Indians of the first of said classes; that in other cases, said heirs included both persons of the 1st and 2nd of said classes, and that in still other cases the owners of particular tracts included persons of each of the four classes herein mentioned, but that in no case was any of such lands con-

veyed in whole to Indians of the competent class or to white persons; nor are any of said lands now owned wholly by heirs of the competent class, or by white persons.

That since the allotment of the lands herein involved, various changes have occurred in the ownership of certain of said lands and in the status of the owners thereof owing to the sale or other conveyance of various tracts, to the deaths of certain of the original grantees, and to the issuance of

Certificates of Competency in other cases. Plaintiff

31 further says, however, that one or more restricted

Osage Indians are interested in the relief herein sought with respect to each and every tract herein involved, whether retained by the original owners or their heirs or conveyed to other persons for one or more of the following reasons, to-wit, that titles may be cleared, or that taxes and other charges unlawfully collected shall be returned, or that in cases where such lands have been conveyed by warranty deeds, which was the mode of conveyance used in the transfer thereof, the grantors and their successors in interest shall not be liable for the payment of any claim for taxes, penalties, or interest on said lands growing out of the assessment thereof for the year 1909.

IX

Plaintiff is informed that the sums claimed to be due as taxes, interest and penalties, by reason of the assessment and sale for taxes, for the year 1909, of certain of the lands herein involved, which are identified by the annexed Schedule, marked "B", have not been paid by the Osage Indians to whom such lands were allotted or by their heirs and are held as an unlawful charge against said Indians and as a lien upon their said lands.

That taxes, interest and penalties in the total amount of \$974.77, as nearly as can be ascertained, have been collected from Osage Indians and their heirs by reason of the assessment and sale for taxes, for the year 1909, of certain of the lands herein involved, which are identified by the annexed Schedule, marked "C", showing the respective amounts so collected on the several tracts listed therein.

That the owners of the tracts included in said Schedule "B" are threatened with the loss of their said lands

32 and to the payment of further and additional sums by way of penalties and interest; that the payments made,

as shown by said Schedule "C", were made under legal duress, in that the owners of the tracts therein identified were confronted with the possible loss of their lands, through issuance of deeds to the purchasers thereof, or to the payment of further amounts by way of penalties and interest.

That there are certain other tracts involved in this suit which are not included in either schedule "B" or Schedule "C", mentioned above; to-wit, Tracts 16 and 17, as to which taxes were paid for the year 1909, with resulting penalties and interest, by white purchasers, but that plaintiff is concerned with such payments only to the extent of having the sales of such lands, for taxes for the year 1909, declared void, to the end that the Indian grantors shall not be held for such taxes, or for any penalties or interest accruing therefrom on account of the subsequent conveyance of such lands by warranty deeds.

IX

That the Tax Sale Certificates and all other writings purporting to evidence title in the lands hereof issued to the purchasers thereof at said tax sale and all records in the offices of the County Treasurer and County Clerk, respectively, of Osage County, Oklahoma, evidencing in any way any right, title, or interest in such purchasers by reason of said sales for delinquent taxes, penalties, and interest constitute a cloud upon the title of said Osage Indians

33 to the lands herein involved to the detriment and financial injury of said Osage Indians, and to the injury of plaintiff as well, in that the acts herein complained of are in derogation of the duties and functions of the Government in the premises; that the purchase of said lands by The American National Bank, in its capacity as a national bank, was in contravention of the policy of the United States, and to the injury of plaintiff in that such purchase was in violation of the laws of Congress applicable thereto.

XI

That all sums collected from the owners of the lands herein involved, including assessments made for the year 1909, together with the penalties and interest collected on all alleged Delinquent Taxes, were erroneously and unlawfully collected and should be refunded; that all claims for taxes, penalties and interest alleged to be due and unpaid, growing out of or

based upon the said sale of the lands herein involved for the year 1909 are unlawful and improper and should be withdrawn.

XII

That an order was issued by this Court on the 13th day of November, 1920, in response to the prayer of plaintiff, as set forth in its original bill of complaint, temporarily enjoining the defendants therein named from the commission of any of the acts complained of in said bill during the pendency of this cause, or the further order of this Court, or a judge thereof.

34

XIII

Wherefore, Plaintiff prays that, in addition to the relief heretofore granted, a decree be entered by this Honorable Court vacating, setting aside, and holding for naught all assessments made for the year 1909 for taxes upon the said lands, and all tax sale certificates, tax deeds or other instruments or writings executed or delivered by any of defendants herein, by reason of said sale of November 5, 1917, affecting the said lands.

Plaintiff further prays that defendants Eneas J. McCurdy, the Board of County Commissioners of Osage County, Oklahoma, and the said The American National Bank, be held jointly and severally indebted to the Indian owners of the lands herein involved to the amount of all sums paid by them on or their behalf, because of any sum claimed to be due for delinquent taxes by reason of any assessment made for the year 1909, together with all sums collected as penalties or interest on such taxes, in the total amount of \$974.77, as shown by said Schedule "C"; that said defendants be directed to refund to the plaintiff all sums so paid to them or any of them, where the liability herein claimed is found to exist, together with the interest at the rate of six (6%) percent per annum from the date of the unlawful collection of such moneys until the date the same shall be refunded; that said defendant Eneas J. McCurdy be held personally, as well as officially for the return of all sums so illegally collected from the owners of said lands or from any one acting in their behalf.

Plaintiff finally prays for relief, general and special, touching the matters and things herein alleged, not inconsistent

35 with the allegations of this bill, and plaintiff offers to do equity in respect to all matters, things and persons mentioned herein, as shall be deemed just and equitable by this Honorable Court.

And may it please Your Honor to grant to plaintiff a writ or writs of subpoena to be directed to the said Eneas J. McCurdy and Andrew B. Ludwick, County Treasurer and County Clerk, respectively, of Osage County, Oklahoma, to the Board of County Commissioners of Osage County, Oklahoma, and to the said The American National Bank of Pawhuska, Oklahoma, and to the said Robert S. Stuart, thereby commanding them at a time certain and under a certain penalty therein to be limited, to personally appear before this Honorable Court, and then and there full, true, and direct, and perfect answer make to all and singular the premises, and to stand and perform, and abide by such orders, direction and decree as may be made against them, or either of them, in the premises, as shall be just and equitable, and that plaintiff may recover its costs herein expended.

HERBERT H. PECK

United States Attorney

S. W. WILLIAMS

Special [Assisstant] to the
Attorney General

JOSEPH W. HOWELL,

Special Assistant to the
[the] Attorney General

Schedule A

36 (Data from records of office of Superintendent
for the Osage Agency.)

Schedule referred to in paragraph 1 of Plaintiff's amended bill of complaint in the case of the United States of America vs E. J. McCurdy et al., Equity No. 438.

No. 1

Wah-te-sah, Allotment No. 300 Died December 10, 1908

Wah-hrah-lum-pah, [Allottment] No. 198, sole heir, a restricted Indian.

W $\frac{1}{2}$ NE; SE $\frac{1}{4}$ NW $\frac{1}{4}$; NW $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 28-24-4 (tax sale certificate No. 9133)

The above land was sold to Arthur Bouton. Deed approved by the Interior Department August 28, 1912.

No. 2

Edward Cox, Jr., Osage [Allotment] No. 168. Died Feb. 25, 1906.

Heirs: Edward Cox, #165 $\frac{1}{2}$ interest

A-non-to-op-pe, #166 $\frac{1}{2}$ interest.

Edward Cox has a certificate of competency and his one half interest is unrestricted. A-non-to-op-pe is a restricted Osage Indian.

Lt. 3, SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 6-24-5 (tax sale certificate 9126)

Edward Cox deeded his interest in the above land to A-non-to-op-pe. Land has not been by A-non-to-op-pe.

No. 3

Edward Cox, Jr., [Allotment] No. 168, died Feb. 25, 1906.

Heirs: same as No. 2.

NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17-25-5 (tax sale certificate 9130)

The above land was not sold with the approval of the Secretary.

37

No. 4

Wah-hrah-lum-pah [Allotment] No. 96. Died Sept., 23, 1908.

Fanny Wheeler #732—sole heir (now deceased)

Heirs of Fanny Wheeler;

Ben Wheeler #731, $\frac{1}{3}$ int. Restricted

Fred Wheeler #733 $\frac{1}{6}$ " " "

Mary Wheeler #734 $\frac{1}{6}$ " " "

a minor Osage

Louis Wheeler $\frac{1}{6}$ "

Indian not enrolled

Francis Wheeler $\frac{1}{6}$ int.

Indian not enrolled.

N $\frac{1}{2}$ NE $\frac{1}{4}$;SW $\frac{1}{4}$ NE $\frac{1}{4}$;NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 29-23-6 (tax sale certificate #9170)

The above land has not been sold with the approval of the Secretary of the Interior.

No. 5

Wah-hrah-lum-pah. Allotment No. 96. Died Sept. 23, 1908.

Heirs; same as above indicated.

E $\frac{1}{4}$ SW;N $\frac{1}{4}$ SE Sec. 30-24-7 (tax sale certificate #9171).

The above land has not been sold with the approval of the Secretary of the Interior.

No. 6

Me-tse-he [Allotment] No. 57 Died Nov. 5, 1907.

Heirs: Wah-shin-kah-sop-py #63—sole heir, a restricted Osage Indian.

Lts. 1 and 2 and S $\frac{1}{2}$ NE $\frac{1}{4}$,SE $\frac{1}{4}$ Sec. 4-21-7 (Tax sale certificate No. 9005)

The above land has not been sold with the approval of the Secretary of the Interior,

38

No. 7

Wah-sha-me-tsa-he, [Allotment] No. 770. Died Aug. 3, 1907.

Heirs; Ho-ke-ah-se #766, 1/2; and Me-tsa-he #787, 1/2. Both restricted Osage Indians.

L t 2 and SE $\frac{1}{4}$ NE $\frac{1}{4}$;W $\frac{1}{2}$,SE $\frac{1}{4}$ Sec. 2-23-8 (tax sale certificate #9025) Of the above land the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 2-23-8 was sold to [Empier] Gas and Pipe Line Company. Deed approved by the Secretary of the Interior August 29, 1918. The remainder of the land has not been sold.

No. 8.

Me-tse-he [Allotment] No. 57. Died Nov. 5, 1907.

Heirs: Wah-shin-kah-sop-py #63, sole heir, a restricted Osage Indian.

NW $\frac{1}{4}$ Sec. 36-22-7 (tax sale certificate #9207)

The above land has not been sold with the approval of the Secretary of the Interior.

No. 9

Ho-ke-ke-cp-pe [Allotment] No. 2178. Died Feb. 7, 1907.

Heirs: Pah-hu-seah #1, 1/2 interest; and Me-to-op-pe #2 1/2 interest. Both restricted Osage Indians. Me-to-op-pe #2 and Pah-hu-seah #1 deeded the SE $\frac{1}{4}$ of 3-21-9 to their minor, unallotted child, Anon-to-op-pe, not enrolled. Deed approved by the Interior Department May 16, 1914.

SE $\frac{1}{4}$ Sec. 3-21-9 (tax sale certificate #8996).

Land not sold except as above stated.

Wah-kon-tah-he-um-pah [Allottment] No. 172.

Died July 7, 1907.

Heirs: Wah-to-sah (Martha Neal) #417, 1/3—a restricted Indian. Oscar Neal #173, 1/3—a restricted Osage Indian now deceased.

Rose Neal Hill #176, 1/6—a competent Indian.

Clara May Neal, 1/6—a minor unallotted Osage Indian.

The Heirs of Oscar Neal #173, deceased, are: Dora St. John-Neal #626, 1/2—a restricted Osage Indian; and Frances Neal, 1/2—a minor, unallotted Osage Indian.

NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 9-27-8 (tax sale certificate 9045).

The above land was sold to Oscar Neal #173, now deceased, through partition proceedings in the County Court of Osage County.

No. 11

Wah-kon-tah-he-um-pah, [Allottment] No. 172. Died July 7, 1907.

Heirs: Same as above stated.

E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 6-27-8 (Tax sale certificate #9046).

Land partitioned to Oscar Neal #173, now deceased, in the County Court of Osage County.

No. 12.

Wah-kon-yah-he-um-pah #172. Died July 7, 1907.

Heirs: Same as above stated.

E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 7-27-8 (tax sale certificate #9047)

Land partitioned to Oscar Neal #173, deceased, through the County Court of Osage County.

Myron Bangs #403. Died Sept. 19, 1907

Heirs: Lucy Bangs #404, 1/2—a restricted Osage Indian, and Myron Bangs, Jr., 1/2—a minor Osage Indian not enrolled.

S $\frac{1}{2}$ SE Sec. 16-29-8 (tax sale certificate 9060).

Lucy Bangs #404 conveyed her interest in the above land to Myron Bangs, Jr., deed approved by the Interior Department May 9, 1913

No. 14

Myron Bangs #403. Died Sept. 19, 1907

Heirs: Same as above stated.

N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 21-29-8 (tax sale certificate #9061).

Lucy Bangs conveyed her interest in the above land to Myron Bangs, Jr., deed approved by the Interior Department May 9, 1913.

No. 15.

Anon-to-op-pe [Allotment] No. 180. Died April 28, 1907.

Heirs: To-wan-gah-he, #162, 1/4.

Gilbert Cox, #139, 1/4

Edward Cox, #165, 1/4

E-Ne-ke-op-pe #298, 1/4

All of the above heirs are restricted Osage Indians except Edward Cox #165 who has a certificate of Competency.

SW $\frac{1}{4}$ NE $\frac{1}{4}$; N $\frac{1}{2}$ SE $\frac{1}{4}$; SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 13-24-4 (tax sale certificate No. 9131.)

The above land has not been sold with the approval of the Secretary of the Interior.

41

No. 16.

Wah-tsa-ah-tah, Osage Allottee #2.26. Died Oct. 1, 1906.

Heirs: Amos Osage, #118, 1/2 interest and Ne-kah-ah-se, #119, 1/2 interest. Both are restricted Indians.

NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 8-23-6 (tax sale certificate [\$]9173)

Partition sale through County Court of Osage County to H. G. Burt, approved by Interior Department Oct. 26, 1916.

No. 17.

Wah-tsa-ah-tah, [Allotment] No. 2126. Died Oct. 1, 1906.

Heirs: Same as above stated.

NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 9-23-6 (tax sale certificate 9174.)

Partition sale through County Court of Osage County to H. G. Burt, approved by Interior Department October 26, 1916.

No. 18.

Pun-q-tah, #334 Died September 6, 1906.

Heirs: Francis Drexell, #329, 1/2 int. (Now deceased): and Wah-ko-sah-moie, #330, 1/2 int.

Both of said Heirs being restricted Indians.

The heirs of Francis Drexell who died April 24, 1913, are:
 Wah-ko-sah-moie, #330, 1/3—a restricted Osage Indian.
 We-kah-ah-se, #331, 2/15—a restricted Osage Indian.
 Me-tsa-kah, #332, 2/15—a restricted Osage Indian, now deceased.

Topah-moie—2/15—a minor Osage Indian, not enrolled.
 Tsa-me-tsa-he, 2/15—a minor Osage Indian not enrolled.
 E-tah-wah-ah, 2/15—a minor Osage Indian, not enrolled.
 The Heirs of Me-tsa-kah, #332 who died May, 1918 are:
 Wa-ho-sah-moie, #330—sole heir, restricted Indian.
 SE $\frac{1}{4}$ Sec. 9-25-4 (tax sale certificate #9145.)

The above land has not been sold with the approval of the Secretary of the Interior.

42

No. 19.

Hlu-ah-to-me, #368. Died March 26, 1906.

Heirs: Bryon Wilson, #366, 15/96—now deceased.

Theodore Wilson, #367, 15/96

Wah-hrah-lum-pah, #198, 15/96—now deceased.

He-ah-to-me, #357, 13/96

Richard Kenny, #255, 12/96

Men-shon-tse-e-tah, #234, 12/96—now deceased.

Wah-to-sah, #111, 6/96

Francis Opahsuah, #112, 6/96—now deceased.

Grace Entekah, #356, 2/96

All of the above heirs were restricted Osage Indians.

The Heirs of Bryon Wilson, #366

Clara Wilson, #323, 1/2—Restricted Indian.

Theodore Wilson, #367, 1/4—Restricted Indian.

Francis Webster, #198, 1/4—Restricted Indian.

The Heirs of Francis Webster, #198, deceased, not yet determined.

The Heirs of Men-shon-tsa-e-tah, #234, deceased:

Son-se-o-grah, #233, 1/3—Restricted Indian.

Dudley Haskell, #236, 2/9—Restricted Indian.

Me-hum-kah, #349, 2/9—Restricted Indian.

Mary Kenworthy, #235, 2/9—Restricted Indian.

The Heirs of Francis Opahsuah, #112, deceased:

Nattie Walsh, #354, 1/2—Restricted Indian.

Francis Marie Drexell, 1/2—a minor Osage Indian.
 not enrolled.

SE $\frac{1}{4}$ of Sec. 1-23-3. (tax sale certificate #9147)

The land was sold at a [partition] sale through the County Court to Wah-hrah-lum-pah (Frances Webster) #198, now deceased.

43

No. 20

Moie-en-gra-tah, [Allotment] No. 333. Died August 28, 1906.

Heirs:

Frances Drexell, #329, 1/2—Restricted Indian, now deceased.

Wah-ko-sah-moie, #330, 1/2—Restricted Indian.

The Heirs of Frances Drexell, #329, deceased, are:

Wah-ko-sah-moie, #330, 1/3—restricted Indian.

Ne-kah-ah-se, #331, 2/15—a restricted Indian.

Me-tsa-kah, #332, 2/15 restricted Osage Indian, now deceased.

Tc-pah-moie, 2/15—minor Osage Indian, not enrolled.

Tsa-mo-tsa-he, 2/15—Minor Indian, not enrolled.

E-tah-wah-ah, 2/15—minor Osage Indian, not enrolled.

The heirs of Me-tsa-kah, #332, deceased, are:

Wah-ko-sah-moie, #330—sole heir, a restricted Indian.

SW $\frac{1}{4}$ NW $\frac{1}{4}$; E $\frac{1}{2}$ SE $\frac{1}{4}$; SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 4-24-5 (tax sale certificate, No. 9142)

The above land has not been sold with the approval of the Secretary of the Interior.

No. 21.

Sin-cha-wah-kon-tah Allotment No. 2176. Died April 3, 1907.

Heirs: Paul Peace, #338. 1/2 Restricted Indian.

Clara Marshall Peace, #271, 1/2—Restricted Indian.

Paul Peace deeded his one half interest to his minor children, Joseph and David Peace, Not enrolled, deed approved by Interior Department July 1, 1913.

NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 29-24-6 (tax sale certificate #9193.)

Land not sold except as above stated.

44

No. 22.

Sin-cha-wah-kon-tah, [Allotment] No. 2176. Died April 3, 1907.

Heirs: Same as stated in 21.

W $\frac{1}{2}$ NE $\frac{1}{4}$: NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 30-24-6 (tax sale certificate 9194).

Paul Peace conveyed his one half interest in the above land to his minor children, Joseph and David Peace, not enrolled—deed approved by the Interior Department July 1, 1913.

No other sale of above land.

No. 23.

Myron Bangs [Allotment] No. 403 Died Sept. 19, 1907.

Heirs: Same as No. 13.

SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 20-26-7 (tax sale certificate 9200)

Lucy Bangs conveyed her interest to Myron Bangs, Jr., deed approved by the Interior Department May 9, 1913.

No. 24.

Myron Bangs Allotment No. 403. Died September 19, 1907.

Heirs: Same as No. 14.

E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 29-26-7 (tax sale certificate 9201)

Lucy Bangs conveyed her interest in the above land to Myron Bangs, Jr., deed approved by the Interior Department May 9, 1913.

No. 25.

Myron Bangs Allotment No. 403. Died September 19, 1907.

Heirs: Same as No. 14.

SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 32-26-7 (tax sale certificate 9202)

Lucy Bangs conveyed her interest in the above lands to Myron Bangs, Jr., deed approved by the Interior Department May 9, 1913.

45

No. 26.

Wah-hrah-lum-pah Allotment No. 414. Died March 28, 1907.

Heirs:

Andrew Jackson, #413, 2/3 restricted Indian, now deceased.

Ne-kah-sha-tsa, #695, 1/3 restricted Indian, now deceased.

Heirs of Andrew Jackson, #413, deceased, are:

Mildred Abbott, #696, 1/5 Restricted Indian.

Lucy Bangs, #404, 1/5 restricted Osage Indian.

Peter Clark, #248 1/5—restricted Osage Indian.

Roman Logan, #676, 1/5—restricted Osage Indian.

Isabelle Pitts, #674, 1/5—restricted Osage Indian, now deceased.

Heirs of Isabella Pitts, #674, deceased, are:

William Pitts, #673, 1/3—a restricted Osage Indian.

Cenna Pitts, #1/3—minor Osage Indian not enrolled.

Irene Pitts, 1/3 minor Osage Child, not enrolled.

Heirs of Ne-kah-she-tsa, #695, deceased, are:

John Abbott, #694, 1/3—competent Osage Indian.

Mildred Abbott, #696, 1/3—restricted Osage Indian.

Hattie Abbott, 1/3 minor child, not enrolled.

SW $\frac{1}{4}$ Sec. 33-26-7 (tax sale certificate 9203)

The land has not been sold with the approval of the Secretary of the Interior.

46

No. 27.

James Bigheart [Allotment] No. 527. Died October 5, 1908.

Heirs: Alice Bigheart McGraw, 1/3—a white woman.

Mary J. Deal, #1186, 1/6 competent Osage Indian.

Rosa L. Bigheart, #528, 1/6 competent Osage Indian.

Sarah L. Bigheart, #529, 1/6 restricted Indian, dec'd.

Belle L. Bigheart, #530, 1/6 Restricted Osage Indian.

Heirs of Sarah L. Bigheart, #529, are:

John R. Spurrier, 1/3 white man.

Margaret L. Spurrier, 2/9—minor Osage child not enrolled.

Alice Florine Spurrier 2/9 minor Indian child, not enrolled.

James R. Spurrier, 2/9—minor Osage child, not enrolled.

N $\frac{1}{2}$ NW, SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 9-24-11 (tax sale certificate 9103)

The above land has not been sold with the approval of the Interior Department.

No. 28.

James Bigheart, Allotment No. 527. Died October 5, 1908.

Heirs: Same as above stated.

W $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 20-24-11 (tax sale certificate 9104)

Of the above land only the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 20-24-11 was allotted to James Bigheart. It has not been sold with the approval of the Secretary of the Interior.

The SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 20-24-11 was allotted to Rosa L. Deal #528, a competent Osage Indian.

Schedule B—Not paid

(Referred to in paragraph IX of plaintiff's bill of complaint, in United States v. McCurdy, et al. Eq. 438).

Note:—

The following schedule shows the Osage allotted lands, by tracts, which were sold November 5, 1917, for taxes claimed to be due and unpaid for the year 1909, together with the amounts for which sold including, in each case, the tax plus the interest and penalty thereon to date of sale. The tract numbers correspond to the tract numbers of Schedule "A", referred to in paragraph I of the bill referred to above and relate to the same land in each case. A penalty of 18% per annum is demanded upon each of these amounts from Nov. 5, 1917, to the present date or to date of payment hereafter.

No. of Tract.	No. of Delinquent Certificate.	Amount for which sold.
1	9133	\$78.40
4	9170	43.20
5	9171	50.05
6	9005	155.25
7	9025	31.45
8	9207	26.49
27	9103	52.30
28	9104	44.89

Schedule C—Paid

(Referred to in paragraph IX of plaintiff's bill of complaint in the case of the United States v. McCurdy et al., Eq. 438.)

Note:—

The following schedule shows Osage allotted lands which were sold Nov. 5, 1917, for taxes claimed to be due thereon for the year 1909, together with the amounts for which sold, said amounts including in each case the tax for 1909 plus the interest and penalty thereon to date of Sale. The schedule also shows total amount paid in each case, as nearly as can be ascertained, by computation, by the Indian owners to redeem the land or to secure an assignment of tax sale certificates. Penalties have been computed from Nov. 5, 1917,

(date of sale) to date of settlement on amounts for which sold on said date. Tract numbers and lands are identical with those listed in Schedule A of same case.

	No. of Tract	No. of Delinq. Tax Cert.	Amount sold for in 1917.	Date of settle- ment	Amount of final payment.
x	2	9126	\$77.85	10-18-1920	\$119.23
x	3	9130	11.67	10-18-1920	17.67
x	9	8996	25.30	7-19-1920	37.62
				Costs	1.50
y	10	9045	10.45	5-25-1920	15.25
y	11	9045	19.17	5-25-1920	27.29
y	12	9047	20.43	5-25-1920	29.83
z	13	9060	20.43	5-18-1920	29.75
				R. Cert. & Costs	2.75
z	14	9061	20.43	5-18-1920	29.75
				R. Cert. & Costs	2.75
x	15	9131	83.85	7-7-1920	124.09
y	18	9145	45.20	8-20-1920	67.91
z	19	9147	70.35	6-11-1920	103.91
				R. Cert. & Costs	4.50
y	20	9142	80.20	8-20-1920	120.50
x	21	9193	15.97	7-19-1920	24.74
				Costs	1.25
x	22	9194	53.12	7-19-1920	78.98
				Costs	1.25
z	23	9200	12.88	5-18-1920	18.76
				R. Cert & Costs	2.75
z	24	9201	25.25	5-18-1920	36.76
				R. Cert. & Costs	2.75
z	25	9202	9.85	5-18-1920	14.35
				R. Cert. & Costs	2.25
x	26	9203	37.95	7-19-1920	56.43
Total.....					\$974.77

x Assigned by purchaser to owner but cancellation not noted on Co. records.

y Cancellation noted on County Records but no Redemption Certificate.

z Redemption Certificate issued.

Endorsed: Filed in the District Court on January 31, 1921.

49 (Answer to Amended Bill of Complaint.)

Come now the defendants, and for answer to plaintiff's amended bill of complaint herein, admit all statements of fact well pleaded therein as [modified] by the stipulation filed herewith, but deny all legal conclusions, deductions and inferences based on such statements of fact.

Defendants further allege and state that said amended bill of complaint as modified by said stipulation, does not state facts sufficient to constitute an equitable cause of action in favor of said plaintiff and against these defendants or either of them, and is insufficient in law to entitle said plaintiff to the relief therein prayed.

Wherefore, said defendants having fully answered, pray the Court that said amended bill of complaint be dismissed, and that they have such other and further relief in the premises as in equity and good conscience they are entitled.

C. K. TEMPLETON,
ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Counsel for Defendants.

Endorsed: Filed in the District Court on March 1, 1921.

50 (Stipulation that certain Osage Indians died
without receiving certificates of
competency, etc.)

It is hereby stipulated and agreed between the plaintiff and the defendants in the above entitled cause;

First: That each of the Osage Indians whose name appears upon the schedule of allotments approved November 19, 1908, and in whose name or right the lands involved herein was allotted as alleged in plaintiff's amended bill of complaint in the above entitled cause, died without receiving a certificate of competency, and that all such lands were allotted as surplus lands.

Second: That the two exhibits hereto attached and marked "A" and "B" respectively, relating to the preparation and approval of the schedule of allotments referred to herein, shall be accepted and considered as evidence in this cause.

Third: That the date of the death of Wah-hrah-Lumpah mentioned in paragraph 7 of the amended bill of complaint herein, was March 28, 1907, instead of the date mentioned in said paragraph, to-wit: March 28, 1909.

HERBERT M. PECK,
U. S. Attorney

S. W. WILLIAMS,
Spec'l Ass't. to the Atty. Gen'l.

JOSEPH W. HOWELL,
Spec'l Asst. to the Atty. Gen'l.
Counsel for Plaintiff.

C. K. TEMPLETON,
County Atty.

ELMER E. GRINSTEAD,
EUGENE F. SCOTT
Counsel for Defendants.

51

Exhibit "A"

Department of the Interior
Office of Indian Affairs

Washington, Oct. 22, 1920.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this Office.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

E. B. MERITT,
Assistant Commissioner.

(Seal)
O'N

4-1995

Land
28343—1908
30718—1908
41879—1908
O M M

Department of the Interior
Office of Indian Affairs

CPH

Washington November 19, 1908.

Subject:
Selections of allotments of
Osage Indians in Oklahoma.

The Honorable

The Secretary of the Interior.

Sir:

The Osage Allotment Act (34 Stat. L., 539) provides, in substance, that each member of the Osage tribe, as shown by the approved roll of membership, shall be permitted to select 160 acres as a first selection, and in like manner to select 160 acres each for a second and third selection; also that each member of the tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead.

On April 25, 1908, Charles E. McChesney, Chairman of the Osage Allotting Commission, transmitted to the Office the schedule of homestead designations, in duplicate. In his letter of transmittal he called attention to the fact that many of the homestead designations vary slightly from 160 acres on account of lot areas and reservations for rights of way of railroads, saying that the exact areas reserved for railroad purposes would be noted on the larger schedule showing the first, second and third selections, which would be transmitted to the Office by June 15th.

On June 16th, Chairman McChesney transmitted to the Office the larger schedule referred to, showing the first, second and third selections; also the lands designated as homesteads and the areas deducted on account of right of way railroads, etc. This schedule, like the other, was submitted in duplicate.

The approved roll of membership made in accordance with the provisions of the allotment act contains 2230 names. Of this number, allotments were made to 2229

Indians, one person, Jane Appleby, a white woman, being enrolled for annuities only. The homestead designations aggregate 355,291.78 acres. The larger schedule referred to shows that the first selections aggregated 354,654.90 acres; the second selections 355,078.65 acres, and the third selections 355,400.76 acres, the three selections aggregating 1,065,134.31 acres. It will be noted that the homestead designations do not exactly agree in acreage with any one of the three selections. This discrepancy arises from the fact that in a number of instances the allottees were permitted to designate their second selections as their homesteads, or to make up their homestead designations from two or more of the selections.

The allotment Act, *supra*, provides also that the schedules of selections and division of lands shall be subject to the approval of the Secretary of the Interior. The schedules have been entered on the tract books of the Office and the entries compared in the usual way. The schedules are set herewith with the recommendation that they be approved, and that the Office be directed to cause deeds to be executed to the several allottees shown thereon, conformable with the provisions of the said Osage Allotment Act.

Very Respectfully

C. F. LARROBEE,
Acting Commissioner.

RS

November 19, 1908.

Agreeable to your recommendation I have approved and returned the Osage schedules herewith; and you are directed to cause deeds to be executed to the several allottees conformable with the provision of the Osage Allotment Act.

JESSE ELLELSM
Assistant Secretary.

54 (Allottees to whom deeds should be executed.)

NAME OF ALLOTTEE		English Trans- lation or English Name	Male	Female	Age	Rel
[First] Name	Indian Name					

Schedule of First, Second and Third Selections of
Osage Reservation in Oklahoma, made by the Osage
Provisions of the Act of Congress, approved June 16, 1906,
instructions of the Indian Office of [August] 4, 1906

1	Pah-hu-seah	Tom Big Chief	M		49	He
---	-------------	---------------	---	--	----	----

Deed dated Nov. 25, 16, to John Olsen
Ap'd. 2/27/17 (4569/17 Rec'd. V. Osage 4,
p. 365.

Deed dated 12-20-10 to John L. Freeman
Ap'd. 4-1-11 (17241/10 Rec'd. V. 1, p. 165
43 G.

2	Me-to-op-pe				F 35	W
---	-------------	--	--	--	------	---

Deed dated Nov. 25, 16, to A. D. Miller
Ap'd. 5-2-17 30130/17 Osage V. 4, p. 409

3	He-ah-to-me	May White			F 17	Da
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Osage
Schedule
1st, 2nd, & 3rd,
Selections

1-502 Pipe line R/W 49818/18 S $\frac{1}{2}$ of S $\frac{1}{2}$ 2-21-9
P. L. R. W. 63327-17

LOTTEE

Section	Town	Range	Acres	100ths	Area Reserved for Railroad Purposes	Remarks
<p>File of First, Second and Third Selections of the Osage Indians, residing on the Reservation in Oklahoma, made by the Osage Allotting Commission, under the provisions of the Act of Congress, approved June 28, 1906 (34 Stat. L., 539) and actions of the Indian Office of [August] 4, 1906.</p>						
Sh	Tom Big Chief	M	49	Head	First Selection NW $\frac{1}{4}$ of SE $\frac{1}{4}$; S $\frac{1}{2}$ of SE $\frac{1}{4}$ NE $\frac{1}{4}$ of NE $\frac{1}{4}$	Homestead Homestead
6, 7	to John Olsen Rec'd. V. Osage 4.				Second Selection NW $\frac{1}{4}$ of NW $\frac{1}{4}$	Sale 1-18-17 4569-17 Petition to Sell 34970/16 4-3-16
					Lot 1 S $\frac{1}{2}$ of SW $\frac{1}{4}$	6 22 9 32 23 9 160 26
					Third Selection NE $\frac{1}{4}$ 8.80 per A Sale 3-2-11 17241/11	10 21 9 160 102850/09
pe		F	35	Wife	First Selection Lots 1, 2, 3 & 4	5 22 9 160.08
					Second Selection S $\frac{1}{2}$ of N $\frac{1}{2}$	5 22 9 160
6, Osage	to A. D. Miller V. 4, p. 409				Third Selection Lot 2 NE $\frac{1}{4}$ of SE $\frac{1}{4}$; S $\frac{1}{2}$ of SE $\frac{1}{4}$	4-25-16 Petition to Sell 41789-16 Sale 3-29-17 30130-17
me	May White	F	17	Daut	First Selection E $\frac{1}{2}$ of NE $\frac{1}{4}$ NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Lot s,	12 22 8 7 22 9 159 04 56 Homestead Homestead
					Second Selection N $\frac{1}{2}$ of SE $\frac{1}{4}$; SE $\frac{1}{4}$ of SE $\frac{1}{4}$ NE $\frac{1}{4}$ of NE $\frac{1}{4}$	23 26 22 8 160 Highway 81410/19
					Third Selection S $\frac{1}{2}$ of S $\frac{1}{2}$	2 21 9 160 Tel R/W 1903/18 1440.03
18/18	S $\frac{1}{2}$ of S $\frac{1}{2}$ 2-21-9 P. L. R. W. 63327-17					

55 Clerk's Note: Portion of this Exhibit "A" to stipulation filed March 1, 1921, is too illegible to be included in this transcript.

* * * * *

Note: Initials heading the column of area reserved for railroad purposes designate railroad companies as follows:

"M. K. & T." designates Missouri, Kansas & Texas Railway Company, total area reservation, 1114.09 acres

"M. V." designates Midland Valley Railroad Company, total area reservations 1367.50 acres

"A. T. & S. F." designates Atchison, Topeka and Santa Fe Railway Company, total area reservations 612.49 acres.

We, the undersigned comprising the Osage Allotting Commission, hereby certify that the First, Second and Third Selections of lands, as shown on the attached and foregoing schedule, embracing pages Nos. 1 to 715, both inclusive, were made by or for the Osage Indians and were duly allotted to them by us in the capacity of the Osage Allotting Commission; that each person whose name appears on said schedule is legally entitled to the land assigned him or her and that the selections and allotments were made in conformity to the provisions of the Act of Congress approved June 28, 1906. (34 Stat. L. 539) and the instructions of the Commissioner of Indian [Affairs] of August 4, 1906.

Done at Pawhuska, Oklahoma, this sixteenth day of June, 1908.

CHAS. E. McCHESNEY, Chairman,
CASSUIS R. PECK, Commissioner,
BLACK DOG, [hix] mark
Commissioner.

Department of the Interior
Office of Indian Affairs

CFH.

Witnesses

Washington, D. C. November 19, 1908. WILLIAM PRYOR,
HEALY M. LOOMIS

The annexed and foregoing Schedule of First, Second and Third Selections of the Osage Indians, made in accordance with the provisions of the Act of Congress approved June 28, 1906 (34 Stat. L. 539) is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

C. F. LARRABEE, Acting Commissioner.

Department of the Interior,
Washington, November 19, 1908.

Agreeably to the recommendation of the Acting Commissioner of Indian Affairs the annexed and foregoing schedule of First, Second and Third Selections of the Osage Indians, made in accordance with the provisions of the Act of June 28, 1906 (34 Stat. L. 539) is hereby approved, and the Commissioner of Indian Affairs is hereby directed to cause deeds to be executed to the allottees therein named, conformably with the provisions of the said Act of Congress.

JESSE E. WILSON,
Assistant Secretary.

56

Exhibit "B"

Department of the Interior
Office of Indian Affairs

Washington, Oct. 22, 1920.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears on record in this office.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

E. B. MERITT,
Assistant Commissioner.

(Seal)

O'N

57 Land Department of the Interior
 Office of Indian Affairs

Washington, August 4, 1906.

Mr. Charles E. McCheaney,
Mr. Charles O. Shepard, and
Black Dog.

Osage Allotting Commission,
Pawhuska, Oklahoma.

Gentlemen:—

The Act of Congress approved June 28, 1906, (Public No. 321) entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes," among other things provides:

Fifth. After each member has selected his or her first, second and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

Sixth. The selection and division of lands herein provided for shall be made under the supervision of, or by a commission consisting of one member of the Osage tribe, to be selected by the Osage council, and two persons to be selected by the Commissioner of Indian Affairs subject to the approval of the Secretary of the Interior; and said commission shall settle all controversies between members of the tribe relative to said selections of land; and the schedules of said selections and divisions of lands herein provided for shall be subject to the approval of the Secretary of the Interior.

You have been designated and appointed by the proper authorities to supervise the selections and make the division of lands among the Indians provided for by the Act. You will be spoken of as "the Osage Allotting Commission."

I enjoin upon you, in the first place, a careful and thorough study of the entire Act. In no other way can you so well qualify yourselves for a proper discharge of your du-

58 ties. Where the Act is clear and specific as to what shall be done and the manner of doing it, it must be followed. The purpose is to literally carry out the provisions of the Act.

An equitable and fair division of the lands, after the "selections" have been made, is of great concern both to the Indians and the Indian Service; and the idea of justice and fairness to all the Indians should control your actions.

The roll of the Osages as it existed on January 1, 1906, will constitute the basis of the division. This roll will be purged and corrected in accordance with the provisions of the Act, and will then constitute the authorized and approved roll, and the tribal lands and tribal funds of the Indians will be equally divided among the members whose names are on the revised and approved roll. It is not the purpose here to give you any instructions respecting the revision of the roll. If necessary, this matter will be taken up in subsequent correspondence. The selections can begin by the Indians whose names are on the roll as it existed on January 1, 1906, without waiting for the purging and correction of the roll as contemplated by the Act.

You may find it necessary to employ a surveying corps to retrace old lines and relocate the old corners, as the original surveys were made about 1871. You should make requisition for the employment of a surveyor and suitable number of assistants when their services are required in carrying out these instructions. Copies of the township plats will be sent you by this office or will be delivered to you by the U. S. Indian Agent. In case your surveyor needs copies of the field notes, these will be supplied also.

The first subdivision of [section] 2 provides:

59 First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; and the adult members shall select their first selections and file notice of the same with the United States Indian Agent for the Osages within three months after the approval of this Act. Provided, that all selections of lands heretofore made by any member of said tribe, against which no contest is pending, be, and the same are hereby, ratified and confirmed as one of the selections of such member. And if any adult member fails, refuses, or is unable to make

such selection within said time, then it shall be the duty of the United States Indian Agent for the Osages to make such selection for the member or members, subject to the approval of the Secretary of the Interior. That all said first selections for minors shall be made by the United States Indian Agent for the Osages, subject to the approval of the Secretary of the Interior: Provided, That said first selections for minors having parents may be made by said parents, and the word "minor" or [minors"] used in this Act shall be held to mean those who are under twenty-one years of age: x x x

Notice of these "first selections", as you will see, is to be filed with the United States Indian Agent within three months after the approval of the Act.

After each member has made his or her first selection of 160 acres as provided by the Act, each member shall be permitted to make a second selection of 160 acres as by the Act provided; and after the second selections are made each member may make a third selection of 160 acres in the manner provided. You as the Allotting Commission will supervise all these selections.

You will observe that these selections are to be made in order—first, second and third. This means that so far as the roll is made up and determined at the time, all the first selections shall be made before any of the second selections can be made; and in like order for the second and third selections. Only by a rigid adherence to the order of selection can equal and exact justice be done to all the members of the tribe. But, unless otherwise ordered, the work of making the second and third selections will not be suspended awaiting the completion and settlement of the final roll. You will settle all controversies between the members of the tribe relating to these selections.

Touching upon the question of the settlement of controversies between members of the [tribe], the second subdivision of section 2 provides:

60 Second. That in making his or her first selection of land, as herein provided for, a member shall not be permitted to select land already selected by, or in possession of, another member of said tribe as a first selection, unless such other member is in possession of more land than he and his family are entitled to for first

selections under this Act; and in such cases the member in possession and having houses, orchards, barns or plowed land thereon shall have the prior right to make the first selection: Provided, That where members of the tribe are in possession of more land than they are entitled to for first selections herein, said members shall have sixty days after the approval of this Act to dispose of the improvements on said lands to other members of the tribe.

This, as well as all other provisions of the Act, should be strictly followed. All selections must conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount designated as a "Lot." After all the "selections" are made, each member will be permitted to designate which of the three shall be his homestead; so that the schedule of homestead selections cannot be made up until after all the selections have been made. The homestead selections, when ultimately determined upon, should be placed on a separate schedule and should be designated "Homestead selections". The other two selections of each member, together with his share of the remaining lands, shall be designated "Surplus lands". It will therefore be necessary for you to prepare two schedules; one of homestead selections and one of surplus lands. Both schedules must be prepared in duplicate. In order to avoid confusion the names must be entered on the allotment rolls in some definite order. The column headed "Allotment No." should be divided. A red ink entry in the first half of the column should show the annuity [number], the allotment numbers running [consecutively]. Adherence to this direction will avoid much confusion and liability to error.

After the "selections" have all been made, the remainder of the lands on the reservation, except the Indian village sites, school sites, town and cemetery sites, and the forty acre tract to John N. Florer, mentioned in the Act, must be allotted to the Indians whose names are on the approved roll, giving to each his or her fair share in acres, as nearly
61 as practicable. In choosing the selections, and in making the allotments, the rule of "approximation" as it obtains in the General Land Office will apply; that is, the applicant is entitled to the nearest approximation to 160 acres, following the legal subdivision as shown by the public surveys. All of the reservations of land mentioned in the Act must conform to the public surveys, and should be en-

tered on the "schedule of surplus lands" at the end of the schedule. The forty acres near Gray Horse on which are located the house of John N. Florer and others will be designated by the Secretary of the Interior on your recommendation; and as has been said, it must conform to the legal subdivisions. Mr. Florer will be allowed to purchase this forty acres at the appraised value to be placed thereon by you. The appraisement should be exclusive of any improvements placed thereon by John N. Florer, Walter O. Florer, or John L. Bird, but should represent the actual cash value, of the land considered in connection with every surrounding circumstance.

As soon as the schedule of "homestead selections" is completed it should be submitted to this Office for the approval of the Secretary. Both schedules must bear proper certificates, signed by all the members of the Allotting Commission. Forms of certificates will be sent to you at the proper time on request. Blank allotment sheets will also be sent you upon request.

The office may call upon you from time to time for reports concerning the progress of your work; these preliminary reports will not take the place of your final reports in submitting the two schedules.

When you shall have completed the division of the lands as contemplated by the Act and these instructions, the schedule of "surplus lands" should be submitted with your final report. If you find it necessary you should call for supplemental instructions on any doubtful point not herein specifically covered.

62 As soon as practicable after entering upon duty, the Disbursing Officer of the Commission will submit an estimate of the amount needed for the employment of a surveyor and the necessary assistants, including an interpreter, which you are authorized to employ when needed, for necessary equipment, and for the compensation of the Commission, for the quarter ending September 30, 1906. Similar estimates of funds should be submitted just before the beginning of each subsequent quarter.

The expenses are payable out of any Osage funds derived from the sale of town lots, royalties from oil, gas, or other minerals, or rents from grazing lands.

A copy of these instructions will be forwarded to the Agent with directions to furnish you all the assistance in his power.

These instructions are to be construed liberally in connection with the Act. They are intended to supplement it but in no sense to override it. The purpose is that the Act shall be carried out, and that equal and exact justice shall be meted out to each and every Indian, so far as practicable.

Please acknowledge receipt of these instructions and notify the Office by wire when you are ready to enter upon your duties.

Very respectfully,

C. F. LARROBEE,
Acting Commissioner.

McPh.
Department of the Interior
Aug. 8, 1906.

Approved:

THOS. KYON,
Acting Secretary.

Endorsed: Filed in the District Court on March 1, 1921.

63

(Motion to set cause for hearing.)

Comes now the plaintiff herein, The United States of America, and respectfully moves that the above entitled cause be set down for hearing at a date convenient to the Court, on the Bill and answer and the stipulation and exhibits filed herein.

HERBERT M. PECK,
U. S. Atty.

JOSEPH W. HOWELL,
Sp. Asst. to Atty. Genl.

S. W. WILLIAMS,
Sp. Asst. to Atty. Genl.
Counsel for Plaintiff.

Endorsed: Filed in the District Court on March 4, 1921.

(Order assigning cause for trial.)

Before Judge Cotteral.

On this 14th day of April, 1921, it is ordered that the following numbered and entitled equity cases be assigned for trial in the Federal Court room at Guthrie, in said district, on the days and dates enumerated, to-wit:

* * * *

Thursday, May 12, 1921.

* * * *

438—United States, vs. Eneas J. McCurdy, et al.

* * * *

(Decree May 13, 1921.)

In the District Court of the United States for
the Western District of Oklahoma.

United States of America,)	
	plaintiff,)
vs.)	
Eneas J. McCurdy, County Treasurer of)	
Osage County, Oklahoma, Andrew B.)	
Ludwick, County Clerk of Osage)	In Equity.
County, Oklahoma, The Board of Com-)	No. 438.
missioners of Osage County, Okla-)	
homa, The American National Bank of)	
Pawhuska, Oklahoma, and Robert S.)	
Stuart,)	
	defendants.)

This cause came on for final hearing this 13th day of May, 1921, upon the bill of complaint, answer and stipulation of fact, and having been argued by counsel and submitted to the court for final determination, upon consideration thereof, it is

Ordered, Adjudged and Decreed, that the bill of complaint herein be, and the same hereby is dismissed, without costs to either party, to all of which plaintiff excepts and said exception is allowed.

Thereupon plaintiff gives notice of appeal in open court, and upon request of plaintiff it is ordered that the tem-

porary injunction heretofore granted in this cause be, and the same hereby is continued in full force and effect pending the final determination of this cause, or the further order of the court.

JOHN H. COTTERAL,
District Judge.

O. K.

JOSEPH W. HOWELL,
Special Asst. to the Atty. General,
Counsel for Plaintiff.

ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Counsel for Defendant.

Endorsed: Filed in the District Court on May 13, 1921.

66

Petition for Appeal.

The above named plaintiff, the United States of America, feeling itself aggrieved by the decree made and entered in this cause on or about May 13th, 1921, does hereby pray that an appeal may be allowed from said decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specifically set forth in the assignment of errors, which is filed herewith.

HERBERT M. PECK,
U. S. Attorney.

S. W. WILLIAMS,
Special Assistant to the Attorney General.
Solicitors for Plaintiff and Appellant.

Endorsed: Filed in the District Court on July 27, 1921.

67

Assignment of Errors.

Now comes the United States of America, the plaintiff and appellant in the above entitled cause, and [and] in connection with its petition for an appeal from the decree lately entered in said cause by this Court, files this its assignment

of errors upon which it intends to rely in the prosecution of its said appeal.

I.

The Court erred in holding that every doubtful question in the case should be decided against the Indians.

II.

The Court erred in holding that the lands involved were taxable as soon as the schedules of individual [allotments] were approved by the Commissioner of Indian Affairs.

III.

The Court erred in holding that the lands were taxable against the Indians prior to the vesting of title in the individual allottees.

IV.

The Court erred in not holding that no title vested in the individual allottees until the deeds were executed by the Principal Chief of the Tribe and until those deeds were approved by the Secretary of the Interior.

68

V.

The Court erred in holding that Indian lands held in trust by the United States are taxable by the State and County authorities.

VI.

The Court erred in not holding that on March 1, 1909, the title to the lands involved was in the United States in trust for the Tribe and that no title was in the individual members.

VII.

The Court erred in holding that the lands involved were taxable for the year 1909.

VIII.

The Court erred in holding that the purchase of the tax certificates by the American National Bank was legal and should not be set aside.

IX.

The Court erred in dismissing the bill.

Wherefore, the plaintiff prays that the decree be reversed and for such other, further and different relief as it may in equity, and good conscience, be entitled to.

HERBERT M. PECK,
United States Attorney.

JOSEPH W. HOWELL,
S. W. WILLIAMS,
Special Assistants to the
Attorney General.

Solicitors for the plaintiff and
appellant.

On application therefor, leave is given to file the foregoing assignment of errors this date.

July 28, 1921.

JOHN H. COTTERAL,
District Judge.

Endorsed: Filed in the District Court on July 28, 1921.

69

Order Allowing Appeal.

It appearing that the above named plaintiff has heretofore filed its petition for the allowance of an appeal and concurrently therewith its assignment of errors,—

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the decree in said cause made and entered on or about May 13th, 1921, be and the same is hereby allowed to the said plaintiff.

JOHN H. COTTERAL,
United States District Judge.

Dated July 27, 1921.

Endorsed: Filed in the District Court on July 27, 1921.

(Election as to printing.)

The United States, the plaintiff and appellant herein, hereby gives notice of its election to take and file the transcript of the record herein in the Circuit Court of Appeals for the Eighth Circuit, to be printed under the supervision of the Clerk of that Court.

HERBERT M. PECK, U. S. Attorney.

JOSEPH W. HOWELL,

S. W. WILLIAMS,

Special Assistants to the Attorney General,
Solicitors for the plaintiff and Appellant.

Service of the foregoing notice acknowledged this 29th day of July, 1921.

ELMER E. GRINSTEAD

EUGENE F. SCOTT,

Solicitors for the defendants and
Appellees.

Endorsed: Filed in the District Court on August 1, 1921.

(Praecipe for Transcript.)

To the Clerk of the above entitled Court:

You will please prepare and duly authenticate a transcript of the record in the above entitled cause for the appeal of the plaintiff herein allowed to the Circuit Court of Appeals for the Eighth Circuit and I hereby designate the following to be included in said transcript.

1. Original bill of complaint;
2. Motion to dismiss the bill;
3. Order over-ruling the motion to dismiss;
4. Amended bill of complaint with exhibits;
5. Answer to amended bill;
6. Stipulation of the parties Feb. 28, 1921, and exhibits accompanying same;

7. Motion to set case for hearing on bill and answer.
- 72 8. Order setting case for hearing on bill and answer;
9. Decree dismissing the bill;
10. Plaintiff's petition for appeal;
11. Amended assignment of errors;
12. Order allowing appeal;
13. Original citation on appeal, showing service;
14. Election of plaintiff as to transcript on appeal;
15. This praecipe for record.

HERBERT M. PECK,
U. S. Attorney.

JOSEPH W. HOWELL,
S. W. WILLIAMS,
Special Assistants to the
Attorney General.

Solicitors for the plaintiff and
Appellant.

Service of the foregoing praecipe acknowledged this 29
day of July, 1921.

ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Solicitors for the defendants
and appellees.

Endorsed: Filed in the District Court on August 1, 1921.

73 (Clerk's Certificate to Transcript).

United States of America, }
Western District of Oklahoma, } ss.

I, Arnold C. Dolde, Clerk of the District Court of the
United States for the Western District of Oklahoma, do
hereby certify the foregoing to be a full, true and complete

transcript of the pleadings, record and proceedings in case Number 438, in Equity, in said Court, wherein The United States of America, is plaintiff, and Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, Andrew B. Ludwick, County Clerk of Osage County, Oklahoma, The Board of Commissioners of Osage County, Oklahoma, The American National Bank of Pawhuska, Oklahoma, and Robert S. Stuart, are defendants, as full, true and complete as the said transcript purports to contain and as called for by the praecipe for transcript of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Guthrie in said District, this 19th day of September, A. D. 1921.

(Seal) By **ARNOLD C. DOLDE**, Clerk,
THEODORE M. FILSON
Deputy Clerk.

Filed Sep 26 1921 E. E. KOCH Clerk

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. S. W. Williams, Special Assistant to the Attorney General, as Counsel for Appellant.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5941.

THE UNITED STATES, Appellant,

vs.

ENEAS J. MCCURDY, County Treasurer, Osage County, Okla.; Andrew B. Ludwick, County Clerk, Osage County, Okla.; Board of Commissioners, Osage County, Okla.; The American National Bank of Pawhuska, Okla., and Robert S. Stuart, Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma.

To the Clerk United States Circuit Court of Appeals for the Eighth Circuit, St. Louis, Mo.:

You will please enter my appearance as Solicitor for the United States, Appellant in the above entitled cause.

S. W. WILLIAMS,
*Special Assistant to the Attorney
General, Pawhuska, Oklahoma.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 26, 1921.

(Appearance of Mr. Herbert M. Peck, United States Attorney, as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

HERBERT M. PECK,
U. S. Atty., Oklahoma City, Oklahoma.
S. W. WILLIAMS,
Special Asst. to U. S. Atty. Gen., Pawhuska, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 30, 1921.

(Appearance of Messrs. Grinstead & Scott and Mr. Frank T. McCoy as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

ELMER E. GRINSTEAD,
Pawhuska, Okla.

EUGENE F. SCOTT,
Pawhuska, Okla.

FRANK T. MCCOY,
Pawhuska, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 29, 1921.

(Appearance of Mr. C. K. Templeton as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
FRANK T. MCCOY,
C. K. TEMPLETON,
Pawhuska, Oklahoma,

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 5, 1921.

(Order of Submission.)

December Term, 1921.

Wednesday, January 25, 1922.

This cause having been called for hearing in its regular order, argument was commenced by Mr. S. W. Williams, Special Assistant to the Attorney General, for appellant, continued by Mr. E. E. Grinstead for appellees and concluded by Mr. S. W. Williams, Special Assistant to the Attorney General, for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1921.

No. 5941.

UNITED STATES, Appellant,

vs.

ENEAS J. McCURDY, County Treasurer of Osage County, Oklahoma,
et al., Appellees.

Appeal from the District Court of the United States for the Western
District of Oklahoma.

Mr. S. W. Williams, Special Assistant to the Attorney General (Mr. J. W. Howell, Special Assistant to the Attorney General, was with him on the brief), for appellant.

Mr. E. E. Grinstead (Mr. C. K. Templeton, Mr. E. F. Scott and Mr. Frank T. McCoy were with him on the brief), for appellees.

Before Carland, Circuit Judge, and Trieber and Pollock,
District Judges.

CARLAND, *Circuit Judge*, delivered the opinion of the Court.

The United States brought this action against appellees to enjoin the sale for taxes for the year 1909 of the lands described in the complaint, to set aside sales already made of such lands on account of taxes alleged to have become due and delinquent for said year and to recover certain money paid by certain Indians to redeem their lands so sold. The lands were allotted to non-competent members of the Osage Tribe of Indians. The case was heard on the complaint, answer, and stipulation of the parties. The trial court dismissed the action and its ruling is assigned as error.

Reduced to its lowest terms, the question for decision is, were the Indians named in the complaint the owners of the lands in question on March 1, 1909, that being the date on which real estate in the State of Oklahoma for the year 1909 became taxable. The lands in controversy were originally purchased by the United States from the Cherokee Nation of Indians on June 4, 1883, for the benefit of the Osage and Kansas Indians and were allotted under the Act of June 28, 1906, (34 Stat. 539). The allotments were completed November 19, 1908. All the allottees died prior to the date last mentioned. The lands were sold November 5, 1917, for the taxes of 1909. Although the allotments were approved by the Secretary of the Interior on or prior to November 19, 1908, deeds for the lands were not signed by the principal chief of the Osage Tribe until in May and June, 1909, and were not approved by the Secretary of the Interior until July 30, 1909. As long as the lands were held in trust by the United States, they were not taxable. This would necessarily be so, and the Supreme Court in *U. S. v. Rickert*, 188 U. S. 432; *Kansas Indians*, 5 Wall. 737, has so decided. See also the Enabling Act of June 16, 1906, under which Oklahoma and the Indian Territory were admitted to the Union. Under the Act of June 28, 1906, the lands embraced in other than homestead allotments, which were called surplus lands, were made inalienable for a period of twenty-five years and non-taxable for three years after the approval of the Act subject to the action of Congress. The lands in controversy were surplus lands. Subdivision 7 of Sec. 2 of the Act of June 28, 1906, contains the following provision: "Provided, that the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in the case of the death of the allottee, unless otherwise provided by Congress." It is contended by appellees that as the lands in controversy were allotted in the name and right of the Osage members who died prior to November 19, 1908, and as Sec. 8 of the Act of 1906, provides that the lands of deceased members shall descend according to the laws of Oklahoma that the owners of these lands on March 1, 1909, had received the title to the same by descent and not by allotment, but if this is

true, the heir would only get such title as the ancestor had. This contention also assumes that title to the lands in controversy passed from the United States by reason of the allotment. To so hold would render that portion of the Act of 1906 in regard to deeds of no use. The language referred to reads as follows: "All deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior." We are clearly of the opinion that it required a deed executed and approved as provided in the Act to pass the title. *U. S. v. Reynolds*, 250 U. S. 104. The lands did not become taxable on the death of the allottee prior to the execution and delivery of the deed that the law declared should convey the title. Counsel for the appellees however, urge that if it is true that the title did not pass until the deeds were executed and approved, that title would relate back to and take effect as of the time of the approval of the allotments. The doctrine of relation however, is a legal fiction adopted by the courts for the purposes of justice and not to impose a burden. *Gibson v. Chouteau*, 13 Wall. 92; *Lykens v. McGrath*, 184 U. S. 169.

Moreover, the doctrine of relation could not be applicable in this case as there was no basis for it on March 1, 1909. The deeds had not then been executed and approved. That the money paid for illegal taxes may be recovered in this case is established by *Ward v. Love County*, 253 U. S. 18.

The judgment below is reversed and the case remanded with instructions to grant the relief prayed for.

Filed April 14, 1922.

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1921, Friday, April 14, 1922.

No. 5941.

UNITED STATES, Appellant,
vs.

ENEAS J. McCURDY, County Treasurer of Osage County, Oklahoma;
Andrew B. Ludwig, County Clerk of Osage County, Oklahoma;
The Board of Commissioners of Osage County, Oklahoma; The
American National Bank of Pawhuska, Oklahoma, and Robert S.
Stuart.

Appeal from the District Court of the United States for the Western
District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in

this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with instructions to grant the relief prayed for.

April 14, 1922.

In the United States Circuit Court of Appeals for the
Eighth Circuit.

No. 5941.

UNITED STATES OF AMERICA, Appellant,

VS.

Eneas J. McCurdy, County Treasurer, Osage County, Oklahoma;
Andrew B. Ludwick, County Clerk of Osage County, Oklahoma;
The Board of Commissioners of Osage County, Oklahoma; The
American National Bank of Pawhuska, Oklahoma, and Robert S.
Stuart, Appellees.

Appeal from the United States District Court for the Western
District of Oklahoma.

Petition for Rehearing.

Come now Eneas J. McCurdy, County treasurer, Osage County, Oklahoma, The Board of Commissioners of Osage County, Oklahoma, The American National Bank, Pawhuska, Oklahoma, and Robert S. Stuart, appellees herein, and respectfully petition the court for a rehearing in the above entitled cause for the following reasons and upon the following grounds, to-wit:

(1) Error of the court in considering this cause on the theory that the issue is a question of title rather than the taxable status of the lands described in complainant's bill.

(2) Error of the court in holding that said lands did not become taxable at the death of the allottee.

(3) Error of the court in failing to give effect to the exceptions contained in subdivision 7, section 2, Act of June 28, 1906, to the effect that said lands were to be non-taxable for three years " * * * except where certificates of competency are issued or in case of the death of the allottee * * * ."

(4) Error of the court in holding said lands exempt from taxation notwithstanding the full equitable title vested in the heirs of the allottees. See *Irwin v. Webb*, Supreme Court United States, opinion March 20, 1922, holding that a state may tax public lands when the full equitable title has passed although no deed or patent has issued.

(5) Error of the court in holding that said lands were not liable for taxes and remained exempt until the allotment deed issued therefor.

(6) Error of the court in refusing to give effect to appellees' contention that the doctrine of relation is applicable in this case.

Counsel for appellees hereby respectfully offer to submit a brief in support of the foregoing petition for rehearing if the court will permit.

Wherefore, appellees pray the court for its order and judgment granting a rehearing herein, and upon such rehearing, the decision and decree heretofore entered in this cause be set aside and judgment entered for the appellees, affirming the judgment of the court below.

Respectfully submitted,

C. K. TEMPLETON,
County Attorney, Osage County, Okla.
FRANK T. McCOY,
EUGENE F. SCOTT,
ELMER E. GRINSTEAD,
Counsel for Appellees.

Certificate of Counsel.

C. K. Templeton, Frank T. McCoy, Eugene F. Scott, and Elmer E. Grinstead hereby certify that we are of counsel for the appellees herein; that we are each familiar with the opinion and judgment in the above entitled cause, of date April 14, 1922; that we are also familiar with the statements and allegations set forth in the foregoing petition for rehearing, and we are of the opinion that said petition for rehearing is well founded, proper to be filed and considered in this cause, and is not intended merely for delay.

C. K. TEMPLETON,
FRANK T. McCOY,
EUGENE F. SCOTT,
ELMER E. GRINSTEAD,
Counsel for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 29, 1922.

(Order Denying Petition for Rehearing.)

May Term, 1922.

Thursday, August 24, 1922.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellees.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

August 24, 1922.

(Motion for Stay of Mandate.)

Comes now Eneas J. McCurdy and other appellees above named and respectively represent to this Court and the Judges thereof that they desire to appeal from the judgment and decree herein to the Supreme Court of the United States or prosecute such other proceedings by way of petition in error, certiorari or otherwise as will permit them to have the judgment and decree herein considered by said Court; that in order that sufficient time be had to perfect the records and that counsel may be afforded a reasonable opportunity to take the necessary steps in the prosecution of such appeal or other proceeding, appellees respectfully request the Court to stay the mandate in this cause for such length of time and upon such conditions as the court may see fit to grant.

C. K. TEMPLETON,

Co. Atty.;

FRANK T. McCOY,

EUGENE F. SCOTT,

ELMER E. GRINSTEAD,

Counsel for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 28, 1922.

(Order Staying Mandate.)

September Term, 1922.

Thursday, September 14, 1922.

Upon motion of counsel for appellees for a stay of the mandate of this Court in this cause, pending an appeal to or other proceedings in the Supreme Court of the United States,

It is now here ordered by this Court that the issuance of the mandate in this cause be, and the same is hereby, stayed pending the disposition of the appeal to, or other proceedings in, the Supreme Court of the United States provided same are applied for within the time allowed by law.

September 14, 1922.

(Petition for Appeal to Supreme Court U. S.)

To the Honorable — —, Circuit Judge:

The above named appellees respectively show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit; that a judgment was rendered therein on the 14th day of April 1922, reversing the decree of the District Court of the United States for the Western District of Oklahoma, and remanding said cause to said Court, with instructions to grant the relief prayed for; that appellees' petition for rehearing in

said cause was overruled and denied August 21, 1922; that the matter in controversy in said cause exceeds \$1,000.00, besides costs, and this cause is one in which an appeal is authorized to be taken from the final decree of said United States Circuit Court of Appeals for the Eighth Circuit, and one proper to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, said appellees pray that an appeal be allowed them in the above entitled cause, to the Supreme Court of the United States, and directing the clerk of said United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause with all things concerning same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellees, may be reviewed under the rules of said Supreme Court of the United States, and if error be found, corrected, according to the laws and customs of the United States.

And your petitioners and appellees herein further pray that all proper orders relating to bonds, security for costs, or other matters required of them, be made and entered herein.

C. K. TEMPLETON,
County Attorney, Osage County, Oklahoma.
ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Of Counsel for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 18, 1922.

(Assignment of Errors on Appeal to Supreme Court U. S.)

The appellees above named, in connection with their petition for appeal herein, present and file their assignment of errors and say that in the record and proceedings herein, there is manifest error violative of their rights under the laws of the United States, and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

First. Upon the admitted facts disclosed by the pleadings and stipulations of parties, the court erred in reversing the decree of the District Court of the United States Western District of Oklahoma, with instructions to grant all the relief prayed for by complainant below.

Second. In adjudging that the lands in question did not become subject to taxation upon the death of the allottees.

Third. In adjudging that the lands in question did not become subject to taxation prior to the execution and delivery of the deed, that the law declared should convey title.

Fourth. In adjudging that the courts of the United States were authorized to nullify the taxes assessed against the lands in ques-

tion, the title to which had passed by descent and purchase to nonmembers of the Osage Tribe of Indians.

Fifth. In adjudging that the lands in question did not become subject to taxation upon the passing and vesting of the full, equitable title.

Sixth. In adjudging that all the lands in question were held in trust by the United States on the first day of March, 1909.

Seventh. In considering and determining this cause upon the theory that the issue was one of title rather than the taxable status of the lands described and referred to in complainant's bill.

Eighth. In failing to give effect to the provisions of sub-division seven, section two, Act of Congress, of date, June 28, 1906 (34 Stat. L. 539), to the effect that said lands were to become taxable upon the death of the allottees.

Ninth. In refusing to give effect to appellee's contention that the doctrine of relation is applicable to the facts of this case.

Wherefore, Appellees above named prayed that said judgment and decree of said Circuit Court of Appeals may be reversed in all things, and for all proper relief.

C. K. TEMPLETON,
County Attorney, Osage County, Okla.;
ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Of Counsel for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 18, 1922.

(Affidavit as to Amount in Controversy.)

STATE OF OKLAHOMA,
Osage Sounty, ss:

Robert S. Stuart, of said County and State, being duly sworn on his oath says, that he is one of the appellees above named, and is personally acquainted with the issues in the above entitled cause, and the several amounts involved therein; that in schedule A, to complainant's bill, a large number of tax sale certificates are asked to be cancelled and nullified and the taxes on the lands therein described vacated and for naught held; that the total amount involved in said schedule is not set forth therein, but as affiant is informed and believes, the amount of taxes assessed against the lands in said schedule described exceed the sum of \$1,000.00.

That the amount of taxes levied and assessed against the lands described and referred to in Schedule B to complainant's bill amounts to \$482.03, and the amount of taxes levied and assessed against the lands described in schedule C to complainant's bill amounts to \$974.77.

That by reason of the premises, the matters referred to in controversy in this suit, and the value thereof, exceeds the sum of \$1,000.00, exclusive of interest and costs.

ROBERT S. STUART,
Affiant.

Subscribed and sworn to before me this 7th day of September, 1922.

[SEAL.]

LENORE ROBERSON,
Notary Public.

My commission expires, December 8, 1923.

(Endorsed:) Filed in U. C. Circuit Court of Appeals, Sep. 18, 1922.

(Order Allowing Appeal to Supreme Court U. S.)

And now on this 18th day of September 1922, the above entitled cause comes on for hearing upon the application of appellees above named, for an order allowing an appeal to the Supreme Court of the United States, from the decree of this Court heretofore filed and entered herein, and upon consideration of such application, it is ordered:

That an appeal to the Supreme Court of the United States is hereby allowed; that a certified transcript of the record, exhibits and all proceedings had in said cause, of record herein, be forthwith transmitted by the clerk of the court, to the Supreme Court of the United States.

It is further ordered that the bond on appeal herein be, and is hereby fixed at the sum of \$5,000.00, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal; said bond to be approved by one of the Judges of this Court.

ROBT. E. LEWIS,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 18, 1922.

(Bond on Appeal to Supreme Court U. S.)

Know All Men by These Presents, That we, Encas J. McCurdy, County Treasurer, Osage County, Oklahoma, Andrew B. Ludwick, County Clerk, Osage County, Oklahoma, The Board of Commissioners of Osage County, Oklahoma, The American National Bank, Pawhuska, Oklahoma, and Robert S. Stuart, as principals, and the Citizens Trust Company, a corporation, as surety, all of Pawhuska, Osage County, Oklahoma, are held and firmly bound unto the United States of America, in the sum of \$5,000.00, to be paid to the said United States of America, and to the payment of which we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly, severally and firmly by these presents.

Signed and sealed this 7th day of September A. D., 1922.

Whereas, The appellees in the above entitled suit have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Eighth Circuit, on the 14th day of April 1922, and appellees petition for rehearing overruled and denied, August 24, 1922.

Now therefore, The condition of this obligation is such that if said appellees as appellants, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and effect.

ENEAS J. McCURDY,

By E. E. G.,

Atty.,

As County Treasurer, Osage County, Okla.;

ANDREW B. LUDWICK,

As County Clerk, Osage County, Oklahoma;

THE BOARD OF COMMISSIONERS
OF OSAGE COUNTY, OKLAHOMA,

By S. E. TATE,

Chairman;

THE AMERICAN NATIONAL BANK
OF PAWHUSKA, OKLAHOMA,

By CHAS. F. STUART,

Prest.;

ROBERT S. STUART,

Principals.

CITIZENS TRUST COMPANY,

A CORPORATION,

By E. F. SCOTT,

Vice President,

Surety.

[SEAL.]

Attest:

E. E. GRINSTEAD,

Secretary & Trust Officer.

STATE OF OKLAHOMA,

County of Osage, ss:

E. E. Grinstead, of lawful age, first being duly sworn on his oath says, that he is the Secretary and Trust Officer for the Citizens Trust Company, a corporation, with its principal offices and place of business at Pawhuska, Osage County, Oklahoma; that he is the managing officer of said corporation and has charge of its records, securities, funds and other property, and is familiar with the business of said corporation; that said corporation has a Capital Stock fully paid in money of \$100,000.00, and surplus and undivided profits in excess of \$20,000.00, and that said corporation as surety, as aforesaid, is worth the sum of \$5,000.00 over and above all its just debts and liabilities, exclusive of property exempt from execution.

E. E. GRINSTEAD,

Secretary & Trust Officer.

Subscribed and sworn to before me this 7th day of September, 1922.

[SEAL.]

ILENORE ROBERSON,
Notary Public, Osage County, Okla.

My commission expires December 8, 1923.

Approval.

The foregoing bond is approved, both as to sufficiency and form this 18th day of September, 1922.

ROBT. E. LEWIS,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 18, 1922.

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5941.

UNITED STATES OF AMERICA, Appellant,
versus

ENEAS J. MCCURDY, County Treasurer, Osage County, Oklahoma;
Andrew B. Ludwick, County Clerk, Osage County, Oklahoma;
The Board of Commissioners of Osage County, Oklahoma; The
American National Bank, Pawhuska, Oklahoma, and Robert S.
Stuart, Appellees.

Citation.

UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals, Eighth Circuit, wherein Eneas J. McCurdy, et al., appellees above named are appellants and you are appellee, to show cause, if any there be, why the decree rendered against said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert E. Lewis, United States Circuit Judge, in and for the Eighth Circuit, this 18th day of September, 1922.

ROBT. E. LEWIS,
United States Circuit Judge, Eighth Circuit.

Address reply to "The United States Attorney" and refer to initials and number.

Department of Justice.

Office of the United States Attorney,
Western District of Oklahoma,
Oklahoma City.

WAM:LS.

Grinstead & Scott, Attys.,
Pawhuska, Oklahoma.

September 26, 1922.

Gentlemen:

I am in receipt of your letter of September 25, inclosing citation from the Circuit Court of Appeals with reference to case of United States of America vs. Eneas J. McCurdy, et al., citing the plaintiff therein to appear at the Supreme Court of the United States at Washington, D. C., within thirty days after the date thereof, to-wit; (18th day of September, 1922.)

Respectfully,

W. A. MAURER,
United States Attorney.

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5941.

UNITED STATES OF AMERICA, Appellant,

versus

ENEAS J. MCCURDY, County Treasurer, Osage County, Oklahoma;
Andrew B. Ludwick, County Clerk, Osage County, Oklahoma;
The Board of Commissioners of Osage County, Oklahoma; The
American National Bank, Pawhuska, Oklahoma, and Robert S.
Stuart, Appellees.

Citation.

UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals, Eighth Circuit, wherein Eneas J. McCurdy, et al., appellees above named are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert E. Lewis, United States Circuit Judge, in and for the Eighth Circuit, this 18th day of September, 1922.

(Signed)

ROBERT E. LEWIS,
United States Circuit Judge, Eighth Circuit.

Service of the foregoing citation acknowledged this 30th day of September, 1922.

S. W. WILLIAMS,
*Spl. Asst. to the Atty. Genl.,
Solicitor for the United States.*

[Endorsed:] No. 5941. In the United States Circuit Court of Appeals, Eighth Circuit. United States of America, Appellant, versus Eneas J. McCurdy, County Treasurer, Osage County, Oklahoma, et al., Appellees. Citation on Appeal to Supreme Court U. S. and acknowledgments of service. C. K. Templeton, County Attorney, Osage County, Oklahoma; Elmer E. Grinstead, Eugene F. Scott, Counsel for Appellees. Filed Oct. 4, 1922. E. E. Koch, Clerk.

(Clerk's Certificate.)

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Oklahoma as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States was Appellant and Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma et al., were Appellees, No. 5941, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of October, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 29,198. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 648. Eneas J. McCurdy, county treasurer, Osage County, Oklahoma; Andrew B. Ludwick, county clerk, Osage County, Oklahoma; The Board of Commissioners of Osage County, Oklahoma, et al., appellants, vs. The United States of America. Filed October 17, 1922. File No. 29,198.

FILED
SEP 25 1923

WM. R. STANSBURY
CLERK

No.  135
File No. 29198

In the
Supreme Court of the United States.
October Term, 1922.

ENEAS J. McCURDY, COUNTY TREASURER, AN-
DREW B. LUDWICK, COUNTY CLERK, THE
BOARD OF COUNTY COMMISSIONERS, ALL OF
OSAGE COUNTY, OKLAHOMA, *Appellants,*

VERSUS

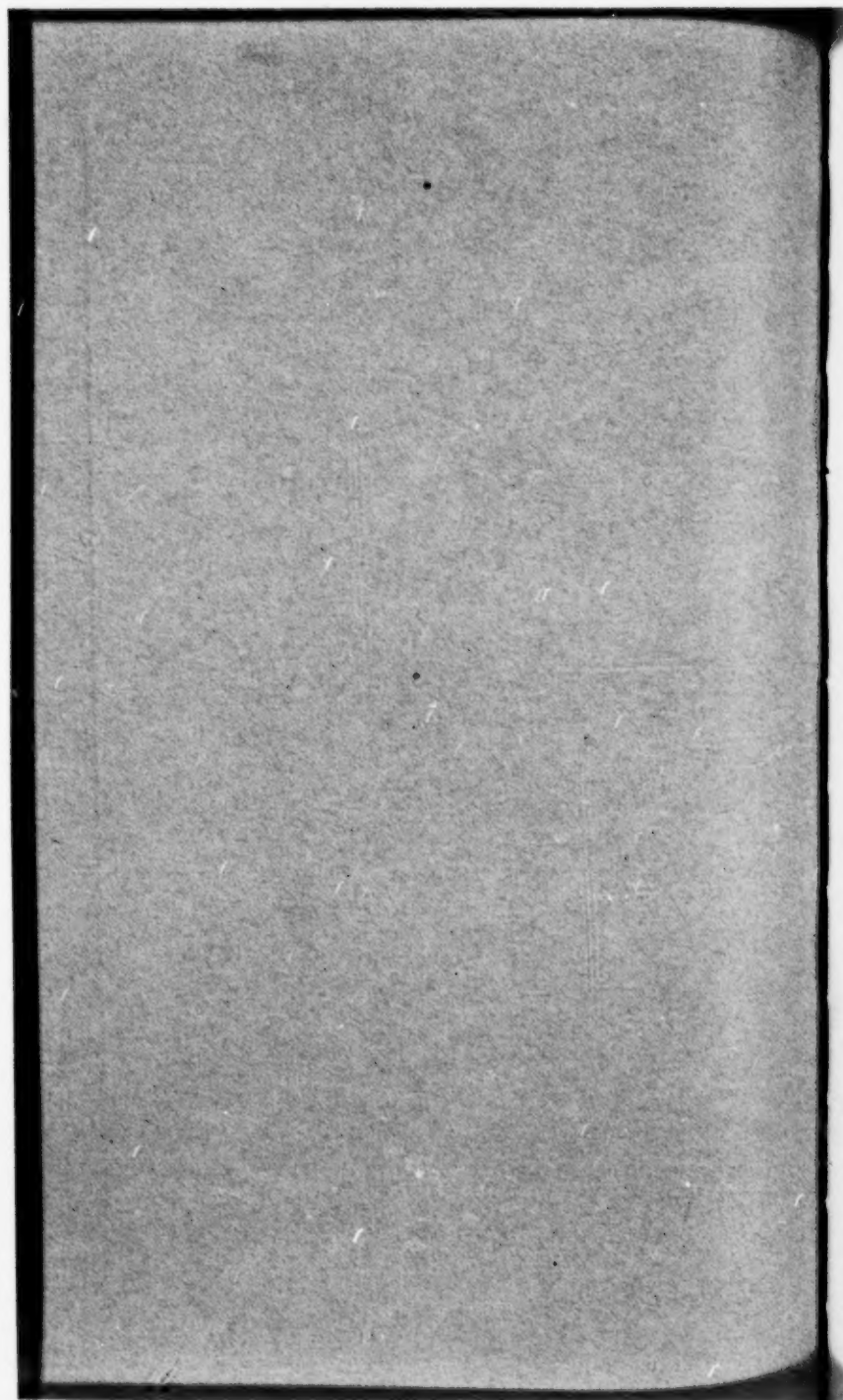
THE UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

**Statement, Abstract, Brief and Argu-
ment by Appellants.**

CHARLES L. ROFF, JR.,
County Attorney,
Osage County, Okla.;

ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Pawhuska, Okla.,
Attorneys for Appellants.



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IN THE
SUPREME COURT OF THE UNITED STATES.
October Term, 1922.

No. 648.
File No. 29198

ENEAS J. McCURDY, COUNTY TREASURER, AN-
DREW B. LUDWICK, COUNTY CLERK, THE
BOARD OF COUNTY COMMISSIONERS, ALL OF
OSAGE COUNTY, OKLAHOMA, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT, ABSTRACT, BRIEF AND ARGU-
MENT BY APPELLANTS.

ASSIGNMENTS *of* ERROR.

(1) Upon the admitted facts disclosed by the pleadings and stipulations of parties, the court erred in reversing the decree of the District Court of

the United States, Western District of Oklahoma, with instructions to grant all the relief prayed for by complainant below.

(2) In adjudging that the lands in question did not become subject to taxation upon the death of the allottees.

(3) In adjudging that the lands in question did not become subject to taxation prior to the execution and delivery of the deed, that the law declared should convey title.

(4) In adjudging that the courts of the United States were authorized to nullify the taxes assessed against the lands in question, the title to which had passed by descent and purchase to nonmembers of the Osage Tribe of Indians.

(5) In adjudging that the lands in question did not become subject to taxation upon the passing and vesting of the full, equitable title.

(6) In adjudging that all the lands in question were held in trust by the United States on the first day of March, 1909.

(7) In considering and determining this cause upon the theory that the issue was one of title rather than the taxable status of the lands described and referred to in complainant's bill.

(8) In failing to give effect to the provisions of subdivision seven, section two, Act of Congress, of date, June 28, 1906 (34 Stat. L. 539), to the effect

that said lands were to become taxable upon the death of the allottees.

(9) In refusing to give effect to appellee's contention that the doctrine of relation is applicable to the facts of this case.

Statement of Case.

This cause was commenced in the District Court, Western District of Oklahoma, by the United States, as plaintiff, against the county treasurer and taxing officers of Osage County, Oklahoma, to cancel tax certificates, restraining collection of unpaid taxes and recover sums paid as taxes, all with reference to certain Indian lands situated in Osage County, Oklahoma, for the year 1909.

Cause was tried in said District Court on the pleadings and stipulation of facts; the decree was in favor of defendants, dismissing plaintiff's bill, but a temporary injunction theretofore granted was continued in force pending an appeal by plaintiff to the Eighth Circuit Court of Appeals (Rec., p. 52).

On hearing in the court last named, a decree was entered in favor of the United States, reversing the decree of said District Court and remanding the cause with instructions "to grant the relief prayed for" (Rec., p. 62). From this judgment an appeal to this court was allowed defendants (Rec., p. 68).

The sole question in this cause is whether certain Osage Indian lands situated in Osage County,

Oklahoma, were subject to taxation for the year 1909, by the State of Oklahoma and its municipal subdivisions.

Lands in the Osage Indian Reservation, now Osage County, Oklahoma, were allotted in accordance with the provisions of Act of Congress, approved June 28, 1906 (34 Stat. L. 539). This statute is known and commonly referred to as the Osage Allotment Act.

Under the scheme of allotment or partition as set forth in said statute, each member of the Osage Tribe, whose name appeared upon the official roll, would take approximately 660 acres of land, one selection embracing 160 acres to be designated as the homestead, and the remainder, approximating 500 acres, as surplus.

In subdivision 7 of section 2 of said Allotment Act it is provided:

“That surplus lands shall be non-taxable for a perior of three years from the approval of this Act, except where certificates of competency are issued or *in case of death of the allottee* (italics ours) unless otherwise provided by Congress.”

As provided in said Allotment Act the lands referred to were divided or partitioned by the Osage Alloting Commission. Under date of August 4, 1906, (Rec., p. 46), the Acting Commissioner of Indian Affairs, with the approval of the Secretary of

the Interior, issued to said Allotting Commission, a letter of instructions or regulations as to the manner of making and completing allotments. These instructions among other things, contained the following (Rec., p. 50):

"When you shall have completed the division of the land as contemplated by the Act, and these instructions, the schedule of 'surplus lands' should be submitted with your final report."

November 19, 1908, Acting Commissioner of Indian Affairs, transmitted a letter to the Secretary of the Interior (Rec., p. 40), reciting that on April 25, 1908, the Osage Allotting Commission, had transmitted to his office the schedule of homestead selections in duplicate and on June 16, 1908, the larger schedule showing the first, second and third selections. This letter concluded:

"The Allotment Act, *supra*, provides also, that the schedules of selections and division of lands, shall be subject to the approval of the Secretary of the Interior. The schedules have been entered on the tract books of the office and the entries compared in the usual way. The schedules are sent herewith with the recommendation that they be approved, and that the office be directed to cause deeds to be executed to the several allottees shown thereon, conformable with the provisions of the said Osage Allotment Act."

On the same date said schedules of allotments were approved by the Secretary of the Interior (Rec.,

p. 41), agreeable to the recommendation of the Commissioner of Indian Affairs, as follows:

"Agreeable to your recommendation I have approved and returned the Osage schedules herewith; and you are directed to cause deeds to be executed to the several allottees conformable with the provision of the Osage Allotment Act."

The deeds directed to be issued as aforesaid were executed in May and June, 1909, and approved by the Secretary of the Interior, July 30, 1909 (Rec., p. 41).

All the lands in question were allotted as surplus lands and in the name or right of allottees who died prior to November 19, 1908. Lands in Oklahoma were subject to taxation as of date March 1, 1909 (Wilson's Stats. 1903, Sec. 5931).

The defendants as taxing officers of Osage County, Oklahoma, caused the surplus lands in question to be assessed for the purpose of taxation for the year 1909. A part of said lands were sold for the taxes for said year and tax certificates issued therefor; a portion of the taxes were paid and defendants below were endeavoring to collect the unpaid taxes when this cause was instituted in the District Court and a temporary injunction granted restraining further proceedings by way of maturing tax certificates or enforcing collection of said taxes.

It was and is the contention of defendants below, as taxing officers as aforesaid, that on the rec-

ord it affirmatively appears that on March 1, 1909, the full, equitable title to said lands had vested in said allottees or their heirs and nothing remained to be done except the ministerial act of writing the deeds. That on this record these lands were subject to taxation for the year 1909.

The United States contends that notwithstanding the death of the allottees, the selection and approval of the surplus lands in question, the direction of the Secretary of the Interior that deeds issue as aforesaid, said lands were not subject to taxation until after said deeds were actually executed.

The District Court adopted the views of the defendants below, and dismissed plaintiff's bill; the Circuit Court of Appeals adopted the view of the United States (Rec., p. 61) and reversed the decree of said District Court. This appeal is from said decree which reversed and remanded said cause with directions "to grant the relief prayed for."

This case is in equity, arises under the laws of the United States, seeks a permanent injunction and there being more than \$1,000 involved (Rec., p. 67), is properly before this court on appeal (Sec. 24, Judicial Code).

The taxing power is of such paramount importance that its abandonment will never be presumed and all property is subject to taxation unless specifically exempt therefrom.

The lands in question were patented by the United States to the Cherokee Nation of Indians, December 31, 1838; June 14, 1883, the Cherokees deeded said lands to the United States in trust for the Osage Tribe of Indians, in consideration of the sum of \$1,099,137.41, then paid by the Osages from the proceeds of their trust lands in the State of Kansas (17 Stat. L. 538). The title to the lands in the Osage Indian Reservation, now Osage County, Oklahoma, was so held June 28, 1906, the date of the approval of the Osage Allotment Act (34 Stat. L. 539).

Exemption from taxation is never presumed but can only be established by express provision of constitution or statute.

—*The Providence Bank, v. Billings*, 4 Peters, 514, 7 Law. ed. 939, loc. cit. 956

Minot v. The Philadelphia, Wilmington & Baltimore R. R. Co., 18 Wall. 206, 21 Law. ed. 888.

In the case last above cited the following is found:

“The power of taxation is an attribute of sovereignty and is essential to every independent government. As this court has said the whole community is interested in retaining it undiminished and has ‘a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear’.”

Under the provisions of the Allotment Act the general exemption from taxation was fixed at three years for the surplus lands of allottees then living, but were made subject to taxation on the death of the allottee. The surplus lands would descend to the allottee's heir, "subject to the laws of the State of Oklahoma." There is no provision for exempting inherited lands from taxation. The heirs may, or may not be enrolled Indians or of Indian blood. If the heirs are allottees, their allotted lands would become taxable at the end of the three year period, while their inherited lands would become taxable at the next taxing period after the title had been cast upon them by descent.

—*Hudson v. Hopkins*, (Okl. 1919) 75 Okl. 260,
183 Pac. 507.

The *Hudson* case, *supra*, deals with the status of the homestead allotments of deceased Osage allottees, and holds such lands become taxable upon the death of the homestead allottee.

At one time, the government contended the surplus lands of Osage tribal members were not taxable after the end of the three year exempt period.

—*United States v. Board of County Commissioners, Osage County, Oklahoma*, 216
Fed. 883.

In the course of an opinion holding to the contrary, the Eighth Circuit Court of Appeals, speak-

ing of the Osage Allotment Act in general, and subdivision 7, of paragraph 2, in particular, said:

"The Act shows plainly that Congress had in mind the distinction between non-taxable and non-alienability. It expressly provided that the homesteads should be inalienable and non-taxable but as to surplus lands, it is provided in the next sentence that they shall be inalienable, only. The same distinction is made in subdivision 7. Not only did Congress have the distinction clearly in mind, but in the second proviso of paragraph 7, it enacted that the surplus lands shall be non-taxable for the period of three years from the approval of this Act. The irresistible import of this language is that after the expiration of the three year period, surplus lands should be taxable; *also, that they would have been taxable during the three year period had it not been for the proviso* (Italics ours). Exceptions from a power establish the power, as well as defines its limits, *Gibbons v. Ogden*, 9 Wheat. 1, 190, 6 L. ed. 23."

In the same case, said court, in speaking of the second proviso of subdivision 7, of section 2, of said Allotment Act, which reads as follows: "*Provided, that the surplus lands shall be non-taxable for the period of three years from the approval of this act, except when certificates of competency are issued or in case of the death of the allottee,*" (Italics ours) said:

"Its purpose, however, seems to us reasonably plain. Congress first intended to suspend the taxability of surplus lands for the pe-

riod of three years. From this exemption it excepted the surplus lands of Indians *who died during the three-year period* (italics ours), or who should receive certificates of competency during that time."

When the original draft of the Osage Allotment Act was presented to Congress, it was provided therein that surplus lands should be non-taxable and inalienable for twenty-five years. While this act was being considered, the Secretary of the Interior addressed a letter to the Acting Commissioner of Indian Affairs, requesting his view upon amendments which proposed that homesteads and surplus lands should be made taxable. The Commissioner's reply to said letter is as follows:

"The office strongly opposes the first proposed amendment providing for the collection of taxes on the homesteads. This is in direct conflict with the provision in lines 8 and 9 on page 6, which declares that the homestead shall be inalienable and non-taxable, until otherwise provided by Act of Congress. Certainly the homesteads of the Indians should be free from taxation as long as they are held in trust for the benefit of the allottees. Such has been the invariable policy of the government from the time the Indian allotments were made, and it is thought that an exception should not be made in the case of the Osages. But I see no special objection to the alternative amendment which provides merely for the payment of taxes on the surplus lands. It is believed that the Osage Indians should be required to pay taxes on their

surplus lands, the same as citizens of Oklahoma Territory. There occurs to me no valid reason why the Indians should not be required to bear their share of the burden of the state and county maintenance through taxation on their surplus lands."

There is no provision of the Oklahoma Enabling Act (34 Stat. L. 267-278) or the constitution or statutes of the state, that in terms or by intendment waives the state's right to tax surplus lands allotted to or in the name of Osage allottees, *upon the death of such allottees.* (Italics ours.)

That inherited lands should be immediately subject to taxation as the property of the heirs of deceased allottees, is in harmony with the theory of "gradual emancipation" of Osage tribal members and this property, as enunciated by Mr. Justice BRANDIES, in *McCurdy v. United States*, 246 U. S. 263, 62 L. ed. 706.

In addition to the foregoing the following cases deal with the problem of taxation of Osage Indian lands in Oklahoma, and will be found instructive in connection herewith:

United States v. Board of County Commissioners, 193 Fed. 485;

United States v. Board of County Commissioners, 216 Fed. 883;

United States v. Board of County Commissioners, 244 U. S. 663, 61 L. ed. 1377;

United States v. Board of County Commissioners, 254 Fed. 570;

United States v. Board of County Commissioners, 251 U. S. 128, 64 L. ed. 184.

Where a right to a patent or deed has become vested in a purchase of public lands, so far as the government is concerned, this is equivalent to a patent or deed actually issued.

Each enrolled member of the Osage tribe of Indians was the owner of one, two thousand two hundred and twenty-ninth interest in all the lands, funds and other property belonging to the Osage tribe of Indians. In consideration of receiving his pro rata part of the funds of said tribe and his selections of land in severalty, as provided, he relinquished his interest in all the remaining property and lands of said tribe. Therefore, each allottee became a purchaser for value of his individual selection of lands.

When all had been done to perfect and conclude the allotment, except the execution and delivery of the certificate of allotment or deed, in conformity with said approved schedules, the certificate or deed was then due and its execution and delivery a mere ministerial act. After the approval of each allottee's selection of surplus lands, and deeds ordered to issue all that remained to be done was a mere matter of detail and not of substance. Under such circumstances, the execution and delivery of a certificate or deed could have been enforced by mandamus.

—*Ballinger v. U. S., ex rel. Frost*, 216 U. S. 240, 54 L. ed. 464, and cases cited.

Where a right to a patent has once become vested in a purchaser of public lands, it is equivalent so far as the government is concerned to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty.

—*Barney v. Dolph*, 97 U. S. 652, 24 Law. ed. 1063;

Stark v. Starr, 6 Wall. 402, 18 Law. ed. 925;

Simmons v. Wagner, 101 U. S. 260, 25 Law. ed. 910.

The case of *Bothwell v. Bingham County, Idaho*, 237 U. S. 642, 59 L. ed. 1157, involved the question as to when arid lands acquired under the Carey Act became subject to taxation by the State of Idaho. The rule announced by Mr. Justice VAN DE VANTER is as follows:

“Neither the Carey act nor the agreement thereunder with the state purported to exempt the land from taxation, or to take it out of the settled rule respecting the taxing of lands acquired under the public land laws. According to that rule, as this court frequently has said, when the proceedings for the acquisition of the title have reached the point where nothing more remains to be done by the entryman, and the government no longer has any beneficial interest in the land, and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land is subject to

taxation, even though the duty of passing the legal title to him has not been discharged—the principle underlying the rule being that one who has acquired the beneficial ownership of the land, and is not excluded from its enjoyment, cannot be permitted to use the fact that the naked legal title remains in the government to avoid his just share of state taxation. *Carroll v. Stafford*, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 505, 33 L. ed. 687, 692, 10 Sup. Ct. Rep. 341; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 530, 40 L. ed. 247, 249, 16 Sup. Ct. Rep. 83; *Hussman v. Durham*, 165 U. S. 144, 147, 41 L. ed. 664, 665, 17 Sup. Ct. Rep. 253; *Sargeant v. Herrick*, 221 U. S. 404, 406, 55 L. ed. 787, 788, 31 Sup. Ct. Rep. 574.”

Where the full, equitable title to lands is held by an individual and the naked legal title held by the United States, such lands are held in trust for the beneficial owner thereof, and are taxable by the state.

—*Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339;

Union Pacific R. Co. v. McShane. 22 Wall. 444, 22 L. ed. 747;

Carrol v. Stafford, 3 Howard 441, 11 L. ed. 671;

Kansas Pac. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373;

Northern Pac. R. Co. v. Traill County, 115 U. S. 600, 29 L. ed. 477.

"He who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid its just share of state taxation."

—*Wisconsin Central R. Co. v. Price County*,
133 U. S. 496, 33 L. ed. 687;

Northern Pacific R. Co. v. Patterson, 154
U. S. 130, 38 L. ed. 934;

Hussman v. Durham, 165 U. S. 144, 41 L.
ed. 664.

The Osage Indians purchased with their own funds the lands in question; the United States took the naked legal title only; that said lands constituted an instrumentality of the federal government in carrying out its duty to its Indian wards, is the sole reason for denying that said lands were subject to taxation for the year 1909.

There is no question as to the use and possession of said lands by the heirs of allottees during the year 1909; the selections were completed, approved and deeds ordered issued prior to March 1, 1909, the taxing date of that year; after said date there was nothing to pay, there was nothing to do but to issue a certificate, deed or patent. There was nothing in the existing circumstances or conditions that would tend to embarrass the executive officers of the government in carrying out the duties of its Indian wards.

Therefore, the fact that said lands constitute an instrumentality of the federal government does

not, in any way, justify the contention that said lands are not subject to taxation for the year 1909.

The lands in question were subject to taxation for the year 1909, notwithstanding they were then held in trust for the benefit of the heirs of deceased allottees.

The contention that these lands are not subject to taxation so long as they are held in trust by the United States, is not well taken. The Allotment Act provided in section 5 that the trust period does not expire until January 1, 1932, while in paragraph 7 of section 2 of said act all surplus lands are made taxable on and after three years, or on June 28, 1909. In other words, Congress has specifically consented that the lands in question might be taxed while held in trust.

Said lands would have been subject to taxation by the State of Oklahoma immediately upon the passage and approval of the Allotment Act, but for the exemption in said act contained.

—*Goudy v. Meath*, 203 U. S. 146, 51 L. ed. 130;

United States v. Board of County Commissioners, McIntosh County, Oklahoma, 271 Fed. 747;

Hudson v. Hopkins, (an Osage County, Oklahoma, tax case) 183 Pac. 507.

As before set forth herein, it seems quite clear that Congress intended the owners of Osage sur-

plus lands should pay taxes thereon. This fact was recognized by the executive officers of the government when the Allotment Act was before Congress, and its terms and provisions being formulated.

Surplus lands were to become taxable:

- (1) At the expiration of three years from the approval of said act;
- (2) Upon the issuance of a certificate of competency to an allottee; and
- (3) Death of an allottee when his surplus lands become taxable as the property of his heirs.

The heirs of deceased allottee took these lands by inheritance, rather than by technical purchase; the designation (allottee) refers to the person to whom an allotment has been made and is to be distinguished from the heir of such person.

—*Parkinson v. Skelton*, 33 Okl. 813, 128 Pac. 131;

Kenoly v. Hawley, (Okl.) 202 Pac. 497.

It is patent therefore that death of an allottee works a change in the status of his allotment. If such allottee has received a certificate of competency, then his homestead would become subject to taxation and upon his death, in any event, his surplus lands, as the property of his heirs, would be compelled to bear their part of the burdens of government.

There is nothing in the Oklahoma Enabling Act of date of June 16, 1906, justifying the contention

that the lands in question are exempt from taxation after the death of the original allottee. The Circuit Court of Appeals refers to said Enabling Act as authority for its conclusion. The *Rickert* case construed the Dakota Enabling Act wherein there was a direct provision against taxing Indian lands, which is entirely absent from the Oklahoma Enabling Act, so far as the surplus lands allotted to Osage Indians are concerned.

—*United States v. Board of County Commissioners, McIntosh County, Oklahoma*,
271 Fed. 747.

The lands in question became subject to taxation prior to the issuance of deeds therefor.

The contention that these lands were not subject to taxation by the State of Oklahoma, prior to the issuance of deeds therefor, is not well founded. Congress consented that the surplus lands should be taxable on the issuance of a certificate of competency, death of the allottee or after three years from the approval of said Allotment Act, June 28, 1906. Said act does not contemplate that deeds for said lands should be issued until the end of the original trust period of twenty-five years. Section 5 of said act evidences the Congressional intention as to when deeds should be issued, and reads as follows:

“That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the

lands, mineral interests and moneys herein provided for and held in trust by the United States, shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys and mineral interests, except as hereinbefore provided."

The words "deed" or "deeded" occur four times only in said Allotment Act, to-wit: Subdivisions 4 and 7, section 2, sections 5 and 8. From a study of these several provisions, it seems clear that it was the intention and spirit of said act that all lands, moneys and mineral interests should be held in trust for a period of twenty-five years, and at the expiration of said trust period, that patents or deeds should issue, and not before.

In the *Rickert* case, 188 U. S. 432, 47 L. ed. 532, cited and relied on by the Circuit Court of Appeals, as authority for the contention that said surplus lands were not taxable until the deed issued therefor, Mr. Justice HARLAND pointed out that the word "patent," twice referred to, was an unhappy use of the term; that what was referred to was not a patent; that the first instrument was nothing more than a certificate of allotment and that the real patent or deed was the instrument to be issued at the

end of the twenty-five-year trust period. In the act, then under consideration, there was no provision for taxing the lands prior to the end of twenty-five years. There is no such inhibition in the Osage Act, but by analogy, the approval by the Secretary of the Interior vests the full equitable title in the allottees or their heirs, and since the act itself provides for taxation before the end of the twenty-five years, or during the trust period, the *Rickert* case supports our contention and is not an authority to the contrary, as cited by the Court of Appeals.

Again, the government's contention herein, that these lands are not subject to taxation until deeds issued therefor, is the same in principle as the contention made in the *Thirty Thousand Land Suits*. In these latter cases, the government contended that said lands were not alienable until patents issued, but this court held against the government's contention.

—*Goat v. United States*, 224 U. S. 458, 56 L. ed. 841;

Mullins v. United States, 224 U. S. 448, 56 L. ed. 834.

Death of the allottee renders his lands immediately taxable in the hands of his heirs. This provision makes definite a situation that might arise, should there be a delay in issuing certificates of allotments or deeds.

It will be noted in the stipulation that some of the heirs are non-members of the Osage tribe, some

members who had secured certificates of competency, and others, Indians by blood, but not tribal members.

With reference to lands belonging to these classes, it is our contention that the act in question would not affect the taxable status of these lands for their owners were not then wards, or in a condition of tutelage to the government. The government has no right to enjoin the state taxing officers from collecting taxes on the lands belonging to such owners.

It being admitted in the pleadings and agreed statement of facts that all lands here involved were allotted to or in the name and right of Osage members who died prior to November 19, 1908, and section 8 of the Act of 1906 (*supra*), providing that the lands of deceased members shall descend according to the laws of Oklahoma, we submit it is not open to question that the owners of these lands on the date of the next taxing period, *viz.*, March 1, 1909, had received said lands by descent and not by allotment.

The Supreme Court, in passing on this proposition in an Osage case, *Kenney v. Miles*, 250 U. S. 62, 63 L. ed. 841, said:

"Under the Act of 1906 the death of a member entitled to an allotment does not extinguish his right. According to the implication of the act and the administrative rulings, the allotment still may be made in his name. Where this is done he is regarded as the allot-

tee, and his heirs as taking by descent from him."

Harris v. Bell, U. S. Adv. Ops. 1920-1921,
page 54;

Perryman v. Woodward, 238 U. S. 148, 59
L. ed. 1242;

Talley v. Burgess, 246 U. S. 104, 62 L. ed.
600.

When the allotments were made and approved by the Secretary of the Interior, the equitable title, the right to the legal title, and the entire beneficial interest in these lands, vested in the allottee, and the title to these allotments under the subsequent deeds related back to and took effect at the time of the allotment.

—*Aaron v. United States*, 204 Fed. 943, 945,
946;

Sections 1 and 7, Act of June 28, 1906 (*supra*);

Gibson v. Chouteay, 13 Wall. 95, 20 L. ed.
534;

Hussman v. Durham, 165 U. S. 144, 41 L.
ed. 664.

In the case of *Aaron v. United States*, *supra*, the District Court opinion thereof was cited and relied upon by appellant. This court, in reviewing the case, used the following language:

"The fact that the deeds of these allotments were subsequently made to the heirs of Cena June after her decease, is immaterial. When the allotments had been made, the equi-

table title, the right to the legal title, and the entire beneficial interest in these lands, subject to the restrictions upon alienation imposed upon them by the Act of Congress at the time they were allotted, vested in the allottee, and the title to these allotments under the subsequent deeds to her heirs related back to and took effect at the time of the allotments."

The allotment was finally completed with the approval of the Secretary of the Interior of the schedule of allotments on November 19, 1908. The lands as they appeared on said allotment schedule have never been changed and they then became sufficiently designated for descent and taxation purposes.

—Par. 6 of section 2, Act of June 28, 1906,
supra;

Johnson v. Towsley, 13 Wall. 72, 20 L. ed.
485;

Garfield v. Goldsby, 211 U. S. 249, 53 L. ed.
168;

Ligon v. Johnston, 164 Fed. 670.

In the case of *United States v. Board of County Commissioners of Osage County, Oklahoma*, 193 Fed. 485, the court used the following language:

"The conclusion has been reached by this court that, by sub-divisions 4 and 7 of section 2 of the Act of 1906, the surplus lands are alienable by the allottees thereof at the end of 25 years, or when certificates of competency are issued to them, and that they are taxable at the

end of three years from the approval of the act, or on the issuance of such certificate, or at the death of the allottees * * *. And they are taxable in case of the death of the allottee, because this exemption clause is so connected with the preceding one that it is clear that both are contingencies when taxation is permitted * * *. The special protection of the mineral interest from sale, if persuasive of intent, adds weight to the view that the lands, aside from that interest, were to be subject to taxation upon the conditions stated.

“It is not alleged nor contended that the reserved interest of the tribe in the minerals has been included in the assessment as a basis for the taxes upon any of these lands, or that the assessments in the names of the allottees were made in a manner contrary to the laws of the state. The taxes must, therefore, be considered as lawfully imposed upon the interest of the allottees in these surplus lands.”

When the case came before the Circuit Court of Appeals, the court said, in 216 Fed. 883:

“Its purpose, however, seems to us reasonably plain. Congress first intended to suspend the taxability of surplus lands for the period of three years. From this exemption it excepted the surplus lands of Indians who died during the three-year period, or who should receive certificates of competency during that time.”

An appeal was perfected from this decision to the Supreme Court of the United States and there dismissed by appellant, 224 U. S. 663, 61 L. ed. 1377.

In view of the last mentioned case, the fact that the case of *Aaron v. United States*, *supra*, was not appealed to the Supreme Court of the United States, and the holding of the Oklahoma Supreme Court in *Hudson v. Hopkins*, 183 Pac. 507, U. S. Adv. Ops. 1920-1921, page 590, we submit that the taxability of the land in controversy has been favorably passed on in favor of appellants herein, both in state and federal courts. In *Hudson v. Hopkins*, *supra*, the Supreme Court of Oklahoma had under consideration the question of the taxability of an inherited homestead for the year 1909. The court there held the land taxable and the cause was appealed to the Supreme Court of the United States where said appeal was dismissed by the court.

The Act of Congress of March 3, 1909 (35 Stat. L. 778), empowered the secretary, upon application, to sell part or all of the surplus lands of members of the Osage Tribe of Indians, subject to the reservation of the mineral interests, thereby recognizing that the ownership of surplus lands was on said date absolutely designated, fixed and determined.

It will be noted that in section 7, of the Allotment Act, said lands were set aside for the sole benefit of the individual members of the tribe entitled thereto, or their heirs, thus, on March 1, 1909, the owners of the lands in question were enjoying the use and benefit thereof, and in accordance with the

patent intent of Congress, said lands should bear their just proportion of the burdens of taxation.

In the case of *United States v. McCurdy*, 246 U. S. 263, 62 L. ed. 706, Mr. Justice BRANDIES pointed out that it was the evident intent of Congress that the Osage Indians and their property should be gradually emancipated from federal control. It seems that this idea is dominant throughout the act. In the instant case, these lands would be taxable for a period of three years, if they continued to be the property of the original allottee, but, in the event of his death, taxable at once as the property of the heirs.

It is respectfully submitted that the decree of the Circuit Court of Appeals, for the Eighth Circuit, reversing the decree of the District Court, Western District of Oklahoma, is erroneous and should be reversed and the decree of the trial court affirmed.

CHARLES L. ROFF, JR.,
County Attorney;
Osage County, Okla.;

ELMER E. GRINSTEAD,
EUGENE F. SCOTT,
Pawhuska, Okla.,
Attorneys for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ENEAS J. McCURDY, COUNTY TREASURER, Osage County, Oklahoma; Andrew B. Ludwick, County Clerk, Osage County, Oklahoma; the Board of Commissioners of Osage County, Oklahoma; the Ameri- can National Bank, Pawhuska, Okla- homa, and Robert S. Stuart, Appellants,	} No. 135.
<p style="text-align: center;">v.</p> THE UNITED STATES OF AMERICA.	

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit by the United States against Osage County, Oklahoma, and others, to enjoin the sale for taxes for the year 1909 of lands allotted to non-competent members of the Osage Tribe of Indians, to set aside sales already made of such lands on account of taxes alleged to be due and delinquent for that year, and to recover money paid by certain of the Indians to redeem their lands that were sold.

The case was heard on the bill and answer and a stipulation of the parties, consequently there is no dispute as to the facts.

The bill alleged that the lands in question are a part of the tract purchased by the United States on June 14, 1883, from the Cherokee Nation for the use and benefit of the Osage and Kansas Indians (R. 20), and that they were allotted as surplus lands to certain members of the tribe pursuant to the provisions of the act of June 28, 1906, c. 3572, 34 Stat. 539. (R. 20.)

All the members of the tribe in whose names these allotments were made died prior to the completion of the allotments. (R. 22, 38.)

The bill further alleged that some time prior to November 5, 1917, the county treasurer advertised for sale the lands involved to enforce the collection of taxes for the year 1909, and that pursuant to such advertisement, a public sale was held at Pawhuska, Oklahoma, on November 5, 1917, and the lands were sold for delinquent taxes to the defendant American National Bank of that place.

The bill further alleged that under the laws of Oklahoma real estate was subject to assessment for taxes for the year 1909 in the name of the owner as of March 1st of that year (Gen. Stats. Oklahoma, 1908, § 6086), and that at that time the lands involved were owned by the United States in trust for the Osage Tribe, title not having vested in the individual members, as the lands were then included in a certain tentative schedule of allotments

to individual members; that while the schedule had been approved by the Secretary of the Interior this approval was but one of a series of steps looking to the final transfer of title which, under the law, could not become complete until deeds were signed by the principal chief of the tribe in May and June, 1909, and approved by the Secretary of the Interior, and that was not done until July 30, 1909. (R. 22, 23.)

The bill prayed for an injunction against the county authorities enjoining them from delivering any tax certificates, deeds, or other instruments of title affecting the lands described or others similarly situated and from collecting or demanding any sums of money from the Indians on account of taxes for the year 1909. (R. 8.)

Motions to dismiss the original bill were overruled by the District Court, and an amended bill was filed by the plaintiff to make the Board of County Commissioners a party defendant and to show what sums of money had been paid by certain of the Indians to redeem their lands that had been sold. The amended bill prayed for a recovery of this money, and asked that all sales of the lands for taxes be set aside and cancelled. (R. 19, 26.)

The defendants answered the amended bill admitting the material averments and, as stated, the case was heard on the bill and answer and a stipulation of the parties. (R. 38.)

Upon the hearing the District Court entered a decree dismissing the bill, but continuing in force the temporary injunction previously issued, pending

the final determination of the cause, and the government sued out an appeal to the Circuit Court of Appeals (R. 52), where the action of the District Court was reversed with instructions to grant the relief prayed for. The further appeal of the defendants brings the case before this court (R. 66).

The opinion of the Court of Appeals will be found in the record at page 61; it is also reported in 280 Fed. 103.

STATEMENT OF THE ARGUMENT.

(1) Lands held in trust for Indians by the United States are not subject to taxation by the state authorities.

(2) No title to any of the lands involved passed to the individual members of the tribe until deeds therefor were signed by the principal chief of the tribe and until those deeds were approved by the Secretary of the Interior.

(3) The government is entitled to recover the money that the Indians were coerced into paying to redeem their lands.

ARGUMENT.

I.

Lands held in trust for Indians by the United States are not subject to taxation by the state authorities.

This proposition is too well settled to require elaborate discussion. *United States v. Rickert*, 188 U. S. 432; *The Kansas Indians*, 5 Wall. 737. Moreover,

there is special statutory provision governing the taxation of these lands.

By the enabling act of June 16, 1906, c. 3335, 34 Stat. 267, under which the Territory of Oklahoma and the Indian Territory became the state of Oklahoma, it was declared that nothing in the constitution to be adopted by the proposed state (§1)—

shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreements, law, or otherwise, which it would have been competent to make if this act had never been passed.

And by the Constitution adopted by the new state it was provided (§ 3, art. 1) that the people inhabiting the state—

do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation.

Also, by § 6 of article 10 of the Constitution, property exempt from taxation was declared to include—

such property as may be exempt by reason of treaty stipulations existing between the

Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws.

The act of June 28, 1906, *supra*, under which these lands were allotted and to which we must look to find when they became subject to taxation, after reserving from allotment certain parcels, provided that from the remainder each member was to be allotted three tracts of 160 acres each, of which one was to be designated as a homestead. Any land remaining was also to be allotted. The funds of the tribe in trust in the hands of the United States were divided pro rata, to be held subject to the supervision of the United States. All oil, gas, and other mineral rights in the lands were reserved for the benefit of the tribe. The tract selected as a homestead was made inalienable and nontaxable subject to the action of Congress. The land embraced in other than homestead allotments, which was called surplus land, was made inalienable for a period of twenty-five years and nontaxable for three years subject to the action of Congress. But the Secretary of the Interior was given power to issue to the allottee a certificate of competency upon which the surplus land held by such allottee became immediately alienable and taxable. *United States v. Osage County*, 251 U. S. 128.

Subdivision 7 of § 2 of the act contains the following:

Provided, That the surplus lands shall be nontaxable for the period of three years from

the approval of this act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress.

It is upon this provision of the law that the defendants rely, because all of the allottees died prior to March 1, 1909. This brings us at once to a consideration of our second point.

II.

No title to any of the lands involved passed to the individual members of the tribe until deeds therefor were signed by the principal chief of the tribe and until those deeds were approved by the Secretary of the Interior.

It will not be seriously contended that the lands were taxable prior to their allotment, because until they were allotted to individual members they were held in trust by the United States for the benefit of the tribe and while so held they were clearly nontaxable. It is plain that Congress intended the surplus lands as a class to be exempt from taxation for a period of three years following the approval of the act, the inference being that they would be taxable at the end of that time. The act also indicates that surplus allotted lands should become taxable before the expiration of the three-year period in the event that a certificate of competency were issued to the allottees or in event of their death.

However, it is equally clear from the act that lands were not to become subject to taxation until title had passed to the individual members, and the act

expressly provides how that title shall pass, namely, by deeds signed by the principal chief of the tribe and approved by the Secretary of the Interior. In this connection the act declares that no such deed shall be valid until it is so approved. The deeds in this case were not even signed by the principal chief of the tribe until in May and June, 1909, and were not approved by the Secretary of the Interior until July 30th of that year.

The Oklahoma statute in force at that time provided that real estate should be taxable against the owner as of March 1st in any one year, and on March 1, 1909, the legal title to these lands was in the United States in trust for the Osage Tribe, because the deeds which were necessary to pass title to the individual members had not been approved by the Secretary of the Interior and had not even been signed by the principal chief of the tribe. The signing by the chief was necessary to pass the equitable interests of the tribe, and the approval of the Secretary was necessary to convey the legal title which up to that time was held by the United States.

So long as the legal title remained in the United States and the allotment act was in the course of administration by the Interior Department, it was beyond the power of the state to interfere in any manner with that administration by imposing a tax upon the land. The act in this case was in the course of administration, and the lands remained within the jurisdiction of the Interior Department

until that jurisdiction was lost by the passing of title to the individual allottee. That was done by the deed executed by the principal chief of the tribe when such deed received the approval of the Secretary of the Interior and not before, because the act of 1906 declares (§ 8)—

That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages but no such deeds shall be valid until approved by the Secretary of the Interior.

This language is too plain to require construction.

That the allotment was not completed until deeds were issued to the allottees is further shown by that provision of subdivision 7 of § 2 of the act which provides—

that the Secretary of the Interior in his discretion at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands *deeded* him by reason of this act.

This clearly indicates that the allottee to whom a certificate of competency was issued could not sell lands until they were deeded to him, and it is in this same subdivision 7 of § 2 that we find the provision that the surplus lands shall be nontaxable for a period of three years from the approval of the act except where certificates of competency are issued or in case of the death of the allottee. We submit that the word allottee here means one to

whom the land has been deeded, that is, one in whom title is actually vested.

The allotment act of June 28, 1906, *supra*, provides that each member of the tribe shall designate which one of his selections shall constitute his homestead and the same shall be so designated in his certificate of allotment and in his deed. Until the deeds were issued, therefore, it could not be definitely known what land constituted the homestead and until that was known no taxes could be lawfully assessed against the land because the homesteads were expressly made nontaxable. Indeed these lands were not assessed for taxes in the year 1909, and nobody at that time believed that they were taxable. It was not until six years later that a tax ferret employed by the state conceived the idea that the lands were liable for taxes for the year 1909, and they were then, in 1915, placed on the tax rolls for the year 1909. (R. 5.)

The jurisdiction of the Secretary of the Interior to approve or disapprove was not lost by his approval of the schedule of allotments, because that was not the final act in the passing of title. No title vested in any individual member of the tribe until the deeds were executed by the principal chief and until those deeds were approved by the Secretary of the Interior. Until that was done the legal title remained in the government, and it was within the power of the Secretary to change any allotment because it was clearly the policy of the allotment act to retain in the Secretary the power to revise until the final

moment when jurisdiction was taken from him. *Lowe v. Fisher*, 223 U. S. 95.

In the case of *United States v. Reynolds*, 250 U. S. 104, it was contended that the twenty-five-year period during which the United States held the title in trust for the benefit of an allottee under the general allotment act of 1887 began with the approval of the allotment by the Secretary and not from the date of the patent, and the Court of Appeals reversed the action of the District Court which held that the twenty-five-year trust period began with the date of the patent. The case was taken to this court, however, where the action of the Court of Appeals was reversed, and it was held that the period began to run from the date of the patent. In that case the court distinguished the case of *Ballinger v. Frost*, 216 U. S. 240, which turned upon the effect of a certificate of allotment issued under the Choctaw and Chickasaw agreement (Act of July 1, 1902, c. 1362, 32 Stat. 641, 644), § 23 of which declared that such certificate should be "conclusive evidence of the right of any allottee to the tract of land described therein." The Indian being a citizen and a resident of the Choctaw Nation duly enrolled and entitled to an allotment, selected the land in controversy upon which her improvements were situated; this was received by the Commission to the Five Civilized Tribes, and after the expiration of nine months, the time prescribed by statute for contest, no contest having been made, a certificate was issued and delivered to her. This court held

that the allottee's rights had become fixed, the Secretary of the Interior thereafter having nothing but the ministerial duty to perform of seeing that a patent was duly executed and delivered.

The *Frost case* is clearly distinguishable from this also, because the approval by the Secretary of the Interior of the schedule of allotments was not made final by the act of 1906, the final act being his approval of the deed when executed by the principal chief of the tribe.

So, in *United States v. Rowell*, 243 U. S. 464, the act of Congress of June 17, 1910, c. 299, 36 Stat. 533, authorized and directed the Secretary of the Interior to allot to Rowell a certain tract of land and to issue him a patent therefor to be in lieu of all allotment and all money claims on account of allotment. Rowell demanded his patent, but before it was issued Congress repealed the act, December 19, 1910, c. 3, 36 Stat. 887. Thereafter Rowell claimed perfect title under the granting act and took possession of the land, whereupon the government instituted proceedings to oust him. The District Court held that his title was complete under the act of June 17, 1910, but on a writ of error from this court the action of the District Court was reversed, it being held that the issue of the patent was necessary to the passing of the title and to the vesting of any right in the grantee.

However, it will be contended that as the allotment was made in this case by the allotting commission

and approved by the Commissioner of Indian Affairs and the Secretary of the Interior prior to March 1, 1909, the subsequent issue of the deed by the principal chief of the tribe and its approval by the Secretary of the Interior, related back to the date of the allotment. In answer to that it may be said that the doctrine of relation is never applied to impose a burden. It is a fiction of law adopted by the courts solely for the purposes of justice and is only applied for the security and protection of persons who stand in some privity with the party who instituted proceedings for the land and acquired the equitable claim or right to title. *Gibson v. Chouteau*, 13 Wall. 92. Also see *Lykins v. McGrath*, 184 U. S. 169, where it is said that the doctrine of relation is resorted to with the view of accomplishing justice.

The statute here involved was construed by the Circuit Court for the western district of Oklahoma in the *United States v. Aaron*, 183 Fed. 347, which involved the sale of both surplus and homestead lands that had been allotted in the name of a deceased Indian, Cena June. The deed to the homestead in that case had been executed by the principal chief of the tribe and had been approved by the Secretary of the Interior, while the deed for the surplus land had been executed by the principal chief but had not been approved by the Secretary. The heirs of Cena June assumed to sell both homestead and surplus lands, and the United States brought suit to set aside the sale. The Circuit Court held that the deed for the

surplus land did not vest any title in the allottee because the same had not been approved by the Secretary of the Interior, and in that connection the court said (p. 351):

As Congress controls the disposition of these tribal lands and it thus makes the approval of the Secretary requisite to the validity of the deeds, it must be held that the surplus lands were not effectively allotted or divided, and that title was not vested in the heirs of Cena June.

True, the Court of Appeals, in affirming the Circuit Court (204 Fed. 943), based its decision upon other grounds and the doctrine of relation was applied so as to permit the deed to the heirs to relate back to the allotment that had been made to the ancestor, but that was done for the purpose of justice and the protection of the heirs.

We repeat that on March 1, 1909, it could not be certainly known what lands would be designated as homesteads because the allotments had not been completed. Congress itself, as late as February 27, 1909, recognized, if it did not declare, that the designation of the homesteads had not become final, because on that date it adopted a joint resolution providing that the homesteads might consist of land designated from any one or more of the first three allotment selections, the designation thereof to be subject to the approval of the Secretary of the Interior. (35 Stat. 1167.) It will be remembered that the act of 1906 provided that one of the first three

selections should be designated as a homestead but the joint resolution of February 27, 1909, changed that and authorized the homestead to be designated from any one or more of the first three selections. This took place more than three months after the allotment schedules had been approved, hence we know that the approval when made was not final.

We submit that this action by Congress clearly establishes our contention that none of the lands were subject to taxation for the year 1909, because on March 1 of that year no title had vested in any of the individual allottees, and it was not known what lands would be subject to taxation.

III.

The government is entitled to recover the money that the Indians were coerced into paying to redeem their lands.

If, then, as we contend, the taxes were unlawfully assessed and levied against these lands, the government is entitled to recover from the county the money paid by certain of the Indians to redeem their lands that were sold, because the bill avers that the money paid by the Indians was paid under duress, in that the owners of the different tracts were confronted as they thought by the possible loss of their lands through the issuance of deeds to purchasers or to the payment of further amounts by the way of penalties and interest. (R. 25.)

In this respect this case is very much like that of *Ward v. Love County*, 253 U.S. 17. The *Love County*

case involved taxes that had been collected by the county on lands declared to be nontaxable by federal laws. In reversing the decision of the Supreme Court of Oklahoma this court said (p. 23):

The claimants were Indians just emerging from a state of dependency and wardship. Through the pending suits and otherwise they were objecting and protesting that the taxation of their lands was forbidden by a law of Congress. But notwithstanding this the county demanded that the taxes be paid and by threatening to sell the lands of these claimants and actually selling other lands similarly situated made it appear to the claimants that they must choose between paying the taxes and losing their lands. To prevent a sale and to avoid the imposition of a penalty of eighteen per cent they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal. * * *

As the payment was not voluntary but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. * * * To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. * * *

If it be true * * * that a portion of the taxes was paid over after collection to the state and other municipal bodies, we regard

it as certain that this did not alter the county's liability to the claimants.

We submit that the *Love County case* is directly in point and controlling on this question, and that therefore the money paid by certain of the Indians to redeem their lands should be refunded.

CONCLUSION.

It is respectfully submitted that the decree of the Court of Appeals should be affirmed.

JAMES M. BECK,
Solicitor General.

S. W. WILLIAMS,
Special Assistant to the Attorney General.

SEPTEMBER, 1923.



McCURDY, COUNTY TREASURER, OSAGE COUNTY, OKLAHOMA, ET AL. *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 135. Argued January 4, 1924.—Decided April 7, 1924.

1. Lands in Oklahoma allotted in severalty to the Osage Indians were not taxable by the State while the title was held in trust by the United States. P. 486.
2. Under the Osage Allotment Act of June 28, 1906, title to surplus allotments did not pass from the United States until execution and delivery of deeds of the Principal Chief approved by the Secretary of the Interior (§ 8). *Id.*
3. The above act makes homestead allotments nontaxable, and surplus allotments nontaxable within three years from the approval of the act, "except where certificates of competency are issued or in case of the death of the allottee", the distinction between homestead and surplus depending on designation by the allottee evidenced in the allotment certificates and deeds. *Held*, that tracts allotted and deeded as surplus were not made taxable within the three year period, by the death of the allottees, where this occurred before the allotments had been completed and approved. P. 487.
4. The title acquired by an Osage Indian through the execution and delivery of the deed prescribed by this act cannot be related back to the time of the completion of allotments for the purpose of

validating taxes sought to be imposed while the land was held in trust by the United States. P. 487.

280 Fed. 103, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing a suit brought by the United States to enjoin collection of taxes, cancel tax sale certificates and recover taxes paid, on lands allotted to members of the Osage Tribe of Indians.

Mr. Elmer E. Grinstead, for appellants, submitted. *Mr. Charles L. Roff, Jr.*, and *Mr. Eugene F. Scott* were also on the brief.

Mr. S. W. Williams, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The United States, as guardian and trustee for the Osage Indians, brought this suit against the county treasurer and taxing officers of Osage County, Oklahoma, and others, to restrain collection of unpaid taxes, to cancel certain tax sale certificates, and to recover sums paid as taxes on land in that county, which had been allotted to members of the Osage Tribe. The District Court dismissed the cause. The Circuit Court of Appeals reversed the decree and remanded the cause with instructions to grant the relief prayed.

The question is whether the allotted lands were subject to taxation for 1909. Under the state laws, land was taxable as of March 1 of that year. In 1883, these lands were purchased from the Cherokee Nation by the United States for the benefit of the Osage and Kansas Indians. Chapter 3572, 34 Stat. 539, approved June 28, 1906, known as the Osage Allotment Act, provided for the division of lands belonging to the Osage Tribe among its

members. (§ 2.) Each member was entitled to make three selections and was permitted to designate one as a homestead, which was required to be so designated in his certificate and deed, and it was provided that the homestead would be inalienable and nontaxable until otherwise provided by act of Congress. The other land allotted to each member was known as surplus land. (Subd. 4, § 2.) The Secretary of the Interior in his discretion and upon the petition of any adult member of the tribe, was empowered to issue to such member a certificate of competency authorizing him to sell and convey any of the lands "deeded him by reason of this Act." It was provided that "the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress." (Subd. 7, § 2.) Further, that the lands of any deceased member should descend to his or her legal heirs according to the laws of Oklahoma,—except in certain cases not here material (§ 6), and that "All deeds . . . shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior." (§ 8.)

The allotments were completed and approved by the Secretary November 19, 1908. All allottees had died prior to that date. All of the lands taxed were allotted as surplus lands. Deeds were not signed by the principal chief until May and June, 1909; and they were not approved by the Secretary until July 30 of that year. None of the allottees received a certificate of competency.

Title was in the United States on the date as of which the assessment was made, and did not pass until the execution and delivery of the deeds. (§ 8.) The lands were not taxable while held in trust by the United States. *United States v. Rickert*, 188 U. S. 432. See also *The Kansas Indians*, 5 Wall. 737; Oklahoma Enabling Act, 34

Stat. 267, § 1, c. 3335, approved June 16, 1906; Oklahoma Constitution, Art. 1, § 3; Art 10, § 6.

The death of the allottees before completion of the allotment did not make the lands taxable as of March 1, 1909. The allotment was made about two and a half years after the approval of the act and after the death of all of the allottees. The three-year provision applies to surplus and not to homestead lands. This classification depends on selection and designation by the allottee, to be evidenced in the certificates of allotment and the deeds. It was impossible to ascertain as of March 1, 1909, what lands were surplus.

Appellants suggest that the title which passed at the time of the execution and delivery of the deed should be held to relate back and take effect at the time of the completion of the allotments. The doctrine of relation gives effect to an act done at one time as if it had been done at another. It is a legal fiction adopted by courts solely for purposes of justice,—to avoid denial or loss of right; but not to impose burdens. Its application depends on some antecedent right. *Gibson v. Chouteau*, 13 Wall. 92, 100; *Lykins v. McGrath*, 184 U. S. 169; *United States v. Atchison, T. & S. F. Ry. Co.*, 142 Fed. 176, 187; *Powers v. Hurmert*, 51 Mo. 136. There is nothing in the Osage Enrollment Act, or in the situation, requiring application of the doctrine of relation against the Indians. The provision empowering the Secretary of the Interior to issue certificates authorizing members found to be competent and capable to sell and convey the "lands deeded" makes ownership and right to sell depend on the deeds. If, on execution and delivery of deeds, title shall be deemed to have passed prior to March 1, 1909, while in fact the land was held in trust by the United States, the lands will be burdened with taxes, which otherwise they would not be subject to. We hold that the doctrine of relation should not be applied.

Affirmed.